EDITOR'S NOTE

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No. 85-2006-ASX
Status: GRANTED

Title: National Can Corporation, et al., Appellants
v.
Washington State Department of Revenue

Docketed:
June 3, 1986

Court: Supreme Court of Washington

Counsel for appellant: Piper, John T.

Vice:
85-1963

Counsel for appellee: Collins, William Berggren

Entry	Date	Note	Proceedings and Orders
1	Jun 3 1986	G	Statement as to jurisdiction filed.
2	Jul 3 1986		Brief amicus curiae of Committee on State Taxation filed.
3	Jul 3 1986		Brief amicus curiae of Amcord, Inc., et al. filed.
4	Jul 3 1986		Motion of appellee Washington State, Dept. of Revenue to dismiss or affirm filed.
5	Jul 9 1986		DISTRIBUTED. September 29, 1986
6	Jul 11 1986	X	Reply brief of appellants Natl. Can. Corp., et al. filed.
7	Oct 6 1986		PROBABLE JURISDICTION NOTED. The case is consolidated with 85-1963, and a total of one hour is allotted for oral argument. Justice Powell and Justice Scalia OUT.
			**********
8	Nov 20 1986		Brief amicus curiae of Amcord Inc., et al. filed.
9	Nov 20 1986		Brief amicus curiae of Committee on State Taxation filed. VIDED.
10	Nov 21 1986		Record filed.
11	Nov 21 1986		Certified copy of original record, 2 folders, received.
12	Nov 20 1986		Joint appendix filed. VIDED.
13	Nov 20 1986		Brief of appellants Natl. Can. Corp., et al. filed.
14	Dec 5 1986	G	Motion of appellants for divided argument filed.
15	Dec 15 1986		Motion of appellants for divided argument GRANTED. Justice Powell OUT.
16	Dec 24 1986		Brief amicus curiae of National Governor's Assoc., et al. filed. VIDED.
17	Dec 19 1986		SET FOR ARGUMENT. Monday, March 2, 1987. This case is consolidated with No. 85-1963. (4th case) (1 hour).
18	Dec 24 1986		Brief of appellee Washington State, Dept. of Rev filed. VIDED.
19	Jan 5 1987		CIRCULATED.
20	Feb 7 1987	X	Reply brief of appellant National Can Corp., et al. filed.
21	Feb 20 1987	X	Joint appendix filed. VIDED.
22	Mar 2 1987		ARGUED.

85-2006

No._____

Supreme Court, U.S.
FILED
JUN 3 1986
JOSEPH F. SPANIOL, JR.
CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1985

NATIONAL CAN CORPORATION, *et al.*,
Appellants,

v.

STATE OF WASHINGTON,
DEPARTMENT OF REVENUE,
Appellee.

ON APPEAL FROM
THE SUPREME COURT OF WASHINGTON

JURISDICTIONAL STATEMENT

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June 2, 1986

155pp

QUESTIONS PRESENTED

1. May a state, consistent with the Commerce Clause, impose an unapportioned gross receipts tax on the manufacture of goods for sale outside the state, while exempting from the tax the identical manufacture of goods for sale within the state?

2. If a state imposes a tax on selling but grants *in-state* manufacturers who pay the selling tax an exemption from another tax, may the state — consistent with the Commerce Clause — impose its selling tax on the unapportioned gross receipts of *out-of-state* manufacturers, without granting them a comparable exemption or benefit?

PARTIES TO THE PROCEEDING

Appellants before the Washington Supreme Court and this Court are 71 business enterprises listed at App. F. The list of parents, subsidiaries, and affiliates of these enterprises required by Rule 28.1 appears at App. G.

Appellee before the Washington Supreme Court and this Court is the State of Washington, through its administrative agency, the Department of Revenue.

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No._____

IN THE
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NATIONAL CAN CORPORATION, *et al.*,
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STATE OF WASHINGTON,
DEPARTMENT OF REVENUE,
Appellee.

ON APPEAL FROM
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JURISDICTIONAL STATEMENT

OPINIONS BELOW

The opinion of the Washington Supreme Court, which appears at App. A, is reported at 105 Wash. 2d 327, 715 P.2d 128 (1986).

The unpublished opinion of the Superior Court for Thurston County appears at App. B, and the judgment of that court appears at App. C.

JURISDICTION

Appellant taxpayers appeal from the final decision of the Washington Supreme Court rendered March 6, 1986. Notice of Appeal was timely filed in the Washington Supreme Court and the Superior Court for Thurston County on May 22, 1986. App. D.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(2).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Commerce Clause of the United States Constitution (Art. 1, §8, cl. 3) and Revised Code of Washington, Title 82 (Wash. Rev. Code tit. 82) are reproduced in pertinent part at App. E.

STATEMENT OF THE CASE

FACTS

Washington imposes a gross receipts tax on the privilege of manufacturing within the state. Wash. Rev. Code § 82.04.240. Companies engaging in interstate commerce, who manufacture in Washington but sell their products outside the state, must pay the tax. Washington exempts from the manufacturing tax purely local companies that engage in the identical manufacturing business in Washington, but sell their products within the state. *See* Wash. Rev. Code § 82.04.440.

Washington also imposes gross receipts taxes on the privileges of selling at wholesale and at retail. Wash. Rev. Code §§ 82.04.270 & 82.04.250. By paying either the Washington wholesaling or retailing tax, wholly local businesses obtain an exemption from the state's manufacturing tax. The Appellant interstate businesses, which paid the same selling taxes, received no such exemption or comparable benefit. *See* Wash. Rev. Code § 82.04.440.

Washington bases both its manufacturing and selling taxes on 100% of the gross receipts — without apportionment — from multistate activities having some nexus with the State. *See* Wash. Rev. Code § 82.04.220. This is true though the gross receipts are produced by a combination of substantial activities in other states and activities in Washington. App. H (Stip. 2-6, 8), App. I (Stip. 2- 8, 13 & Ex. A), App. J (Stip. 2-9, 11). It is stipulated that the taxpayers pay taxes to other states, apportioned to their activities in those states, on the same income that is part of Washington's unapportioned tax base. App. H (Stip. 9 & 10), App. I (Stip. 14 & 15), App. J (Stip. 12).

PROCEEDINGS BELOW

This appeal arises from 53 separate actions, brought by 71 businesses engaged in interstate commerce, for refund of

taxes paid to the State of Washington. The businesses range from the sole proprietorship of Mr. E. M. Matson, Jr., to large multinational companies such as Xerox Corporation and Westinghouse Electric Corporation. These taxpayers alleged in their complaints that the Washington taxes at issue violated the Commerce Clause of the United States Constitution.

The 53 cases, presenting similar facts and the same legal issues, were joined for decision by the Superior Court of Thurston County. There being no factual disputes, the facts were stipulated (App. H, I & J) and the cases proceeded to decision on cross motions for summary judgment. The Superior Court granted the State's motions for summary judgment and dismissed the taxpayers' actions. The same 53 cases were consolidated for appeal to the Washington Supreme Court.

Three cases were selected, as representative of the rest, to serve as "test cases." They represent three fact patterns:

(i) Businesses manufacturing products within Washington and selling them outside the state. Kalama Chemical, Inc., is representative. Kalama seeks a refund of $495,000 it paid in manufacturing taxes.

(ii) Businesses manufacturing products in other states and selling them in Washington. Xerox Corporation is representative. Xerox seeks a refund of $1.5 million it paid in selling taxes.

(iii) Businesses engaged in both the foregoing activities — manufacturing in Washington for sale outside the state, as well as manufacturing in other states for sale in Washington. National Can Corporation is representative. It seeks a refund of $980,000, including both manufacturing and wholesaling taxes it paid.

The Washington Supreme Court affirmed the Superior Court's dismissal of the taxpayers' complaints. The court rejected the taxpayers' contentions that the Washington tax scheme violated the Commerce Clause and, in particular, was contrary to this Court's recent decision in *Armco, Inc. v. Hardesty*, 467 U.S. 638 (1984). The Washington Supreme

Court, noting that *Armco* "has already provoked considerable comment" (105 Wash. 2d at 332 n.1, 715 P.2d at 131, App. A-4 *infra*), narrowly interpreted *Armco* and concluded that it did not control this case. Instead, the court below relied upon various decisions antedating *Armco,* because it was "unable to find . . . a command in the *Armco* decision" to "disregard earlier decisions not overruled." *Id.* at 332, 715 P.2d at 131, App. A-4 *infra.*

In addition to these 53 actions, 52 more cases raising the same issues had been filed by the time of trial below and are awaiting decision in the Washington state courts. The State has estimated that the revenues at issue exceed $423 million for the years 1980-1984.

THE QUESTIONS PRESENTED ARE SUBSTANTIAL

The Decision Below is Irreconcilable with This Court's Recent Decision in *Armco, Inc. v. Hardesty.*

In *Armco, Inc. v. Hardesty,* 467 U.S. 638 (1984), this Court held that a West Virginia wholesale gross receipts tax, from which local manufacturers were exempt, violated the Commerce Clause. The Court specifically rejected the argument that the exemption from the wholesale tax for local manufacturers was justified because local manufacturers were subject to a manufacturing gross receipts tax.

The Washington tax at issue in this case is the precise mirror image of the tax struck down in *Armco.* Like West Virginia, Washington imposes a wholesaling gross receipts tax and a manufacturing gross receipts tax. While West Virginia exempted wholly local business from the wholesale tax, Washington exempts wholly local business from the manufacturing tax. The end result is the same: interstate commerce is subject to a tax burden from which local commerce is exempt.

The State of Washington participated in *Armco* as an amicus curiae to defend the tax scheme at issue here, which it conceded "is a gross receipts tax very similar to the West

Virginia tax."[1] This similarity results from the fact that Washington once had the West Virginia tax scheme. Prior to 1948, Washington, like West Virginia, exempted local business from the wholesaling tax. The Washington Supreme Court, however, anticipated this Court's *Armco* decision and struck down the Washington tax on Commerce Clause grounds. *Columbia Steel Co. v. State,* 30 Wash. 2d 658, 192 P.2d 976 (1948). In response, the Washington legislature simply reversed the tax scheme, exempting wholly local business from the manufacturing tax instead of the selling tax. *See* 1950 Wash. Laws Spec. Sess., ch.5, § 2 (codified at Wash. Rev. Code § 82.04.440). The issue in this case is whether such a "verbal nicet[y]," as the state court termed it in *B. F. Goodrich v. State,* 38 Wash. 2d 663, 668, 231 P.2d 325, 328, *cert. denied,* 342 U.S. 876 (1951), is sufficient to defeat the substance of the *Armco* decision.

The present Washington tax scheme was first before this Court in *General Motors Corp. v. State,* 377 U.S. 436 (1964). That case involved only one of the fact patterns at issue here, an out-of-state manufacturer selling in Washington. The case did not involve a Washington manufacturer selling in interstate commerce.

A sharply divided court (5-4) ruled that there was a sufficient "nexus" between the taxpayer and the state to survive scrutiny under the Due Process Clause. The present case involves no nexus claim.

The *General Motors* majority recognized that "[a] more difficult question might arise from appellant's claim of multiple taxation." 377 U.S. at 448. The majority, however, "refrained from passing on the question of 'multiple taxation'" because appellant "has not demonstrated what definite burden, in a constitutional sense, the [tax imposed by another jurisdiction] places on the identical interstate

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[1]Brief of the State of Washington Department of Revenue as Amicus Curiae at 1, *Armco, Inc. v. Hardesty,* 467 U.S. 638 (1984).

shipments by which Washington measures its tax." 377 U.S. at 449.[2]

The concerns that deterred the majority's consideration of the Commerce Clause challenges in *General Motors* are not present in this case. In the first place, this case concerns not only out-of-state manufacturers in Washington, but also Washington manufacturers selling out of state. The burden on such manufacturers is clear, since they are subject to a manufacturing tax from which wholly local businesses are exempt.

In addition, the multiple taxation found lacking in *General Motors* is present here. The parties to this case have stipulated that the taxpayers here pay taxes to other states on the same income that is included in the measure of the Washington tax. This is true for all three fact situations: a Washington manufacturer selling goods out of state (Kalama), an out-of-state manufacturer selling goods in Washington (Xerox), and a business both selling in Washington goods manufactured out-of-state and selling out-of-state goods manufactured in Washington (National Can). App. H (Stip. 9 & 10), App. I (Stip. 14 & 15), App. J (Stip. 12).

Although the *General Motors* majority was able to "avoid the basic question" of the validity of the Washington tax under the Commerce Clause, 377 U.S. at 457 (Goldberg, J., dissenting), the four dissenting Justices reached the issue. Justices Brennan, Goldberg, Stewart, and White concluded that the very tax at issue here violated the Commerce Clause. As Justice Brennan noted, the Washington tax "cannot be sustained under the standards required by the Commerce

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[2]As the court below noted, the *General Motors* Court "specifically declined to pass on the question of discrimination in the form of multiple-tax burdens because the appellant there failed to demonstrate any actual multiple-tax burden by showing that another state levied an equivalent tax." 105 Wash. 2d at 331, 715 P.2d at 130, App. A-3 *infra*.

Clause." 377 U.S. at 451.[3] Justice Goldberg, joined in dissent by Justices Stewart and White, anticipated the *Armco* holding by characterizing the pre-1950 Washington tax (identical to the West Virginia tax in *Armco*) as facially discriminatory against interstate commerce. 377 U.S. at 459. Justice Goldberg went on to note that the Washington legislature simply "revers[ed] the tax and the exemption," and that "[t]his amended provision would seem to have essentially the same economic effect on interstate sales but has the advantage of appearing nondiscriminatory." 377 U.S. at 459-60. Justice Goldberg's analysis, fully in accord with this Court's later analysis in *Armco,* demonstrated that this nondiscriminatory pretense could not withstand Commerce Clause scrutiny.[4]

In 1982, this Court was presented with an appeal that foreshadowed Armco's challenge to the West Virginia tax. The Court did not grant plenary consideration but simply dismissed the appeal for want of a substantial federal question. *Columbia Gas Transmission Corp. v. Rose,* 459 U.S. 807 (1982). A contemporaneous challenge to one of the Washington taxes at issue here met the same fate, *Chicago Bridge & Iron Co. v. Washington Department of Revenue,* 464 U.S. 1013 (1983). The summary disposition of the challenge to the West Virginia tax, however, did not bar subsequent plenary consideration in *Armco.* As Justice

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[3]Justice Brennan would have required apportionment because "if commercial activity in more than one State results in a sale in one of them, that State may not claim as all its own the gross receipts to which the activity within its borders has contributed only a part." 377 U.S. at 451. Washington's lack of fair apportionment is also challenged by the present Appellants.

[4]The Washington tax was again before the Court in *Standard Pressed Steel Co. v. Department of Revenue,* 419 U.S. 560 (1975). In a brief opinion addressing primarily a nexus issue (not involved in the present case), the Court noted that Standard's case was indistinguishable from *General Motors,* since the taxpayer did not make "any effort" to show that it was confronted with a burden of multiple taxation. 419 U.S. at 563. As noted, it is stipulated that taxpayers in this case are confronted with just such a burden. *See* App. H, I & J.

Powell noted, "[w]e acknowledge our recent dismissal for want of a substantial federal question of a case raising . . . a nearly identical challenge to the West Virginia gross receipts tax. . . . We may find it necessary not to follow such a precedent when the issue is given plenary consideration." 467 U.S. at 644 n.7. So too here, the summary disposition in *Chicago Bridge & Iron* should not preclude plenary consideration in this case, particularly in light of the intervening *Armco* decision.

In *Armco,* the Court held that "a State may not tax a transaction or incident more heavily when it crosses state lines than when it occurs entirely within the State." 467 U.S. at 642. That is precisely what West Virginia and Washington have done. Justice Powell, writing for the 8-1 majority in *Armco,* stressed that the West Virginia statute, by taxing selling activities of out-of-state manufacturers while exempting identical selling by local manufacturers, discriminated on its face against interstate commerce. The Washington taxes exhibit the same facial discrimination. A Washington manufacturer selling its goods in interstate commerce is subject to the manufacturing tax; a Washington manufacturer selling its goods within the state is not.

This facial discrimination persists in the case of an out-of-state manufacturer selling goods in Washington. Both the out-of-state and in-state manufacturer pay the Washington selling tax. In return, however, Washington grants the in-state manufacturer an exemption from its manufacturing tax, to the extent it refrains from interstate commerce. The out-of-state manufacturer receives no such benefit.[5]

The Court in *Armco* struck down the West Virginia tax as facially discriminatory because it "provides that two companies selling tangible property at wholesale in West Virginia will be treated differently depending on whether the taxpayer conducts manufacturing in the State or out of it." 467 U.S. at 642. Here, the Washington tax provides that two companies

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[5]*See also Maryland v. Louisiana,* 451 U.S. 725, 756-57, 759 (1981) ("first use" tax discriminated against interstate commerce: by paying "first use" tax, in-state producers obtained credits against other Louisiana tax liabilities, not available to purely interstate businesses).

manufacturing tangible property in Washington will be treated differently depending on whether they *sell* the property in the state or out of it. If the property is sold within the state, no tax on the manufacture of that property is imposed. If the property is transported out of state for sale, a tax is imposed on its manufacture in Washington. Kalama and National Can, like Armco, are taxed for engaging in the exact activity (manufacturing) that escapes taxation when performed by a wholly local business. Kalama and National Can are taxed because they sell in interstate commerce instead of locally.

By the same token, both Xerox and wholly local business pay the same wholesaling tax, but the local business receives the benefit of a special exemption from the manufacturing tax, solely because it is a local business. Xerox receives no comparable benefit or adjustment to the Washington taxes it must pay.

In striking down the West Virginia tax, the *Armco* Court stressed that the tax could not satisfy the requirement of "internal consistency." In applying that requirement, the Court asks whether there would be an impermissible interference with interstate commerce if the challenged tax were applied by every jurisdiction. The *Armco* Court noted that the West Virginia tax failed to satisfy this requirement: if other states likewise imposed a tax on manufacturing, out-of-state manufacturers selling in West Virginia would pay both a manufacturing tax and a wholesaling tax, while West Virginia manufacturers selling in West Virginia would pay only the manufacturing tax. 467 U.S. at 644. In lone dissent, Justice Rehnquist criticized the application of the internal consistency test to a gross receipts tax, although he conceded its applicability to income taxes. *Id.* at 647-48.

Curiously, the court below followed the reasoning of the *Armco* dissent and declined to apply the "internal consistency" test to Washington's taxes. 105 Wash. 2d at 339, 341-42, 715 P.2d at 134-35, 136, App. A-11,14 *infra.* The court below sought to justify its failure to follow the *Armco* majority by noting that the decision to apply the test in *Armco* "has

been questioned" by commentators, and that not applying the test was necessary "to avoid . . . incongruities posed by taxpayers' arguments." *Id.* at 339, 715 P.2d at 134-35, App. A-11 *infra.*

If the court below had followed the *Armco* majority and required internal consistency, the result would have been as clear as it was in *Armco*. If, like Washington, another state imposes a manufacturing tax, a company manufacturing there but selling in Washington (*e.g.*, Xerox) would be subject to two taxes, while a company manufacturing in Washington and selling in Washington would be subject to only one. Similarly, if other states imposed a wholesaling tax, a company manufacturing in Washington and selling out of state (*e.g.*, Kalama) would be subject to two taxes, while a company manufacturing in Washington and selling in Washington would still be subject to only one.

The State of Washington has candidly recognized the lack of internal consistency inherent in its taxes. Prior to the *Armco* decision, Washington admitted its tax scheme's lack of internal consistency in its amicus brief to this Court.[6] After this Court's decision in *Armco,* the State devised an "executive briefing" chart to depict the State's "*Armco* problem" in a presentation to the Washington legislature. The chart graphically reveals the facial discrimination against interstate commerce in the Washington tax scheme, with "2 taxes" for interstate commerce but only "1 tax" for wholly local

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[6]The discrimination argument we consider here . . . would arise from the combined effects of two tax systems: that of West Virginia and that of another state should it also choose to adopt the same system as West Virginia. If Armco were subject to both states' systems, because it manufactured in one state and sold the products so manufactured in the other, the combined taxes would be greater than the tax imposed on Armco by West Virginia alone.

. . . *That same possibility exists under Washington's business and occupation tax* . . . .

Brief of the State of Washington as Amicus Curiae at 18, *Armco, Inc. v. Hardesty,* 467 U.S. 638 (1984) (emphasis added).

commerce. App. K (Executive Briefing Chart, Washington State Senate Committee on Ways and Means, Report on S.B. 4228 (March 7, 1985)).

In *Armco,* West Virginia sought to defend its tax scheme by arguing that exempting local business from the wholesale tax imposed on interstate business was justified, because local business was required to pay a manufacturing tax. The *Armco* Court rejected this contention, noting that "manufacturing and wholesaling are not 'substantially equivalent events' such that the heavy tax on in-state manufacturers can be said to compensate for the admittedly lighter burden placed on wholesalers from out of State." 467 U.S. at 643. Justice Rehnquist dissented on this point, contending that the manufacturing tax paid by local manufacturers was significantly higher than, and could be said to incorporate, the wholesale tax paid by out-of-state manufacturers. *Id.* at 646-47.

Once again, the court below — unlike the eight Justices in the *Armco* majority — was apparently persuaded by the dissent. The lower court ruled that, under the Washington scheme, wholesaling and manufacturing *could* be considered "substantially equivalent events," such that a tax on one could be said to compensate for the absence of a tax on the other. 105 Wash. 2d at 335-37, 715 P.2d at 132-34, App. A-6-9 *infra.*

The *Armco* majority, however, clearly ruled that manufacturing and wholesaling are not "substantially equivalent events" and therefore the two taxes could not be considered compensatory. The court below turned this analysis on its head: ruling that the manufacturing and selling taxes in Washington *are* compensatory, the court inferred that manufacturing and wholesaling — in Washington — must, therefore, be "substantially equivalent events."[7] There was

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[7] *Compare Armco,* 467 U.S. at 643 ("manufacturing and wholesaling are not 'substantially equivalent events' such that the heavy tax on in-state manufacturers can be said to compensate for [the wholesale tax]"), *with National Can,* 105 Wash. 2d at 335, 715 P.2d 133, App. A-8 *infra* (question is "when the selling and wholesaling taxes would be deemed compensatory and therefore substantially equivalent").

no need for the court below to engage in extended analysis to determine if wholesaling and manufacturing taxes can be considered compensatory. The *Armco* Court had already decided that, since wholesaling and manufacturing are not substantially equivalent events — not in West Virginia, not in Washington, not anywhere — taxes imposed on those events cannot be compensatory, no matter what mechanical similarities the taxes may have.[8]

As noted, the present case is a "test case," and has been viewed as such not only by the parties but by the courts below. There are no factual disputes; the case involves starkly presented legal questions. Almost one-half billion dollars are at stake in this appeal. The appeal is significant, however, not only because of the amounts involved, and not only because it is viewed as a test case, but because it calls into question the very validity of this Court's recent *Armco* decision. The statute at issue is the mirror image of the statute struck down by an 8-1 Court only two years ago in *Armco*. The holding and reasoning below are clearly incompatible with the holding and reasoning in *Armco*. Indeed, the court below seemed more faithful to the *Armco* dissent than to the majority.

Armco would be a dead letter if states can avoid its carefully reasoned standards simply by a semantic device, like Washington's reversal of its tax scheme. The Court, speaking unanimously through Justice Blackmun, has emphatically rejected that kind of verbal formalism, because it "merely obscures the question whether the tax produces a forbidden effect." *Complete Auto Transit, Inc. v. Brady,* 430 U.S. 274, 288 (1977). Such a superficial verbal evasion of *Armco's* standards — if allowed to succeed — would "narrow . . . the rule to one of draftsmanship and phraseology" and demonstrate that West Virginia "had run afoul of a rule of words rather than a rule of substance." *Id.* at 281, 286. The Court could not have intended its *Armco* decision to be so futile.

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[8] *See, e.g., Maryland v. Louisiana,* 451 U.S. 725 (1981) (taxes with identical rates and measures, *id.* at 731, held not compensatory, because not imposed on substantially equivalent events, *id.* at 759).

CONCLUSION

For the reasons expressed above, this Court should note probable jurisdiction and reverse the judgment below.

Dated: June 2, 1986.

Respectfully submitted,

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Appendix A

OPINION OF THE SUPREME COURT OF THE STATE OF WASHINGTON

NATIONAL CAN CORPORATION, *ET. AL,*
Appellants,

v.

STATE OF WASHINGTON,
DEPARTMENT OF REVENUE,
Respondent.

[No. 51910-2 En Banc Filed March 6, 1986]

UTTER, J.–This is a direct appeal from the trial court where various commercial enterprises (Taxpayers) claimed Washington's multiple activities exemption to the business and occupation (B & O) tax, RCW 82.04.440, discriminates against interstate commerce in violation of the commerce clause, U.S. Const. art. 1, § 8. The trial court ruled there was no unlawful discrimination. We agree and hold for the respondent, Department of Revenue that the challenged exemption does not violate the commerce clause. Our holding makes it unnecessary to reach the other issues raised by the parties concerning the constitutionality of both the tax refund interest provision, RCW 82.32.060, and the proposed legislation, ESSB 3678, as well as the appropriate form of relief to be afforded Taxpayers.

Fifty-three separate actions for refunds of B & O taxes paid to the Department were filed. Each Taxpayer claimed the tax violates the commerce clause. These actions were joined for decision by the Thurston County Superior Court which granted the Department's motion for summary judgment and denied the Taxpayers' motions for injunctions against further collection of the B & O taxes in question. The 53 cases were consolidated for this appeal and, in addition, 52 other substantially similar actions are pending in Thurston County Superior Court. The amount in question is estimated to exceed $423 million.

Three plaintiffs were selected by the parties to serve as "test cases" in the appeal. Kalama Chemical, Inc., a representative plaintiff, manufactures its products in Washington and sells them outside of Washington. Xerox Corporation, the second representative plaintiff, manufactures its products outside Washington and sells them within Washington. The appellant in a companion case would appear to fit most closely within this category of plaintiffs. *See Tyler Pipe Indus., Inc. v. Department of Rev.*, 105 Wn.2d 318, ____ P.2d ____ (1986). National Can Corporation, the third representative plaintiff, manufactures products in Washington for sale outside Washington, and also manufactures products outside Washington for sale in Washington. Kalama Chemical, Inc., seeks a refund of the manufacturing tax it paid ($495,000); Xerox Corporation seeks a refund of the wholesale tax it paid ($1.5 million); National Can Corporation seeks a refund of both the manufacturing and wholesale taxes it paid (approximately $900,000). The period in dispute is from 1980 to the present.

The issue before us is whether Washington's B & O tax exemption, RCW 82.04.440, violates the commerce clause because it (1) discriminates against interstate commerce, (2) is unfairly apportioned, or (3) is not fairly related to the services provided by the State.

Neither this court, nor the State Legislature, "is the final arbiter" of commerce clause issues. *See Southern Pac. Co. v. Arizona ex rel. Sullivan,* 325 U.S. 761, 89 L. Ed. 1915, 65 S. Ct. 1515 (1945). In an earlier challenge to this B & O tax, we recognized "our duty [is] to abide by controlling United States Supreme Court decisions construing the federal constitution." *Association of Wash. Stevedoring Cos. v. Department of Rev.*, 88 Wn.2d 315, 318, 559 P.2d 997 (1977), *rev'd,* 435 U.S. 734, 55 L. Ed. 2d 682, 98 S. Ct. 1388 (1978). This court's rulings on the constitutionality of the Washington B & O tax have generally withstood the United States Supreme Court's scrutiny, *see, e.g., General Motors Corp. v. Washington,* 377 U.S. 436, 12 L. Ed. 2d 430, 84 S. Ct. 1564 (1963); *Standard Pressed Steel Co. v. Department of Rev.,*

419 U.S. 560, 42 L. Ed. 2d 719, 95 S. Ct. 706 (1975), except when we have read the commerce clause too broadly and struck down the tax. *See Association of Wash. Stevedoring Cos. v. Department of Rev.,* 88 Wn.2d at 318-20.

We find ourselves today in a similar situation. For over 30 years, Washington's B & O tax has been repeatedly upheld by the federal courts against charges that it discriminated against interstate commerce. *See B.F. Goodrich Co. v. State,* 38 Wn.2d 663, 231 P.2d 325, *cert. denied,* 342 U.S. 876, 96 L. Ed. 659, 72 S. Ct. 167 (1951). In *B.F. Goodrich,* we held that the B & O tax does not discriminate against interstate commerce because, under that law, all wholesalers are taxed identically. We relied on the theory that any multiple-tax burdens on interstate commerce, whereby out-of-state businesses must pay a manufacturing tax in another state plus a wholesale tax in Washington, were merely "an inevitable consequence of the power of the several states to tax". 38 Wn.2d at 669; *see also General Motors Corp. v. State,* 60 Wn.2d 862, 376 P.2d 843 (1962) (B & O tax upheld against charges of discrimination, applying the *Goodrich* analysis). The Supreme Court affirmed, *General Motors Corp. v. Washington,* 377 U.S. 436, 12 L. Ed. 2d 430, 84 S. Ct. 1564 (1964), but specifically declined to pass on the question of discrimination in the form of multiple-tax burdens because the appellant there failed to demonstrate any actual multiple-tax burden by showing that another state levied an equivalent tax.

In *Chicago Bridge & Iron Co. v. Department of Rev.,* 98 Wn.2d 814, 832, 659 P.2d 463, *appeal dismissed,* 464 U.S. 1013 (1983), this court upheld the tax against charges of discrimination in the form of multiple-tax burdens. The court cited *Moorman Mfg. Co. v. Bair,* 437 U.S. 267, 277 n.12, 57 L. Ed. 2d 197, 98 S. Ct. 2340 (1978), for the proposition that the multiple-tax burdens experienced by interstate businesses are a "consequence of the *combined* effect of different states' laws" and were not caused by Washington's taxing scheme. 98 Wn.2d at 832. The United States Supreme Court dismissed the subsequent appeal "for want of a federal question,"

Chicago Bridge & Iron Co. v. Washington Dep't. of Rev., 464 U.S. 1013, 78 L. Ed. 2d 718, 104 S. Ct. 542 (1983), which we understand to be a decision on the merits. *Washington v. Confederated Bands & Tribes of Yakima Indian Nation,* 439 U.S. 463, 476 n.19, 58 L. Ed. 2d 740, 99 S. Ct. 740, *reh'g denied,* 440 U.S. 940, 59 L. Ed. 2d 500, 99 S. Ct. 1290 (1979).

Taxpayers assert, however, that a recent Supreme Court case, *Armco, Inc. v. Hardesty,*____U.S.____, 81 L. Ed. 2d 540, 104 S. Ct. 2620 (1984),[1] effectively overrules, *sub silentio,* these 30 years of Supreme Court doctrine. As a result of their reading of *Armco,* Taxpayers ask this court to strike down the state's B & O tax and refund all moneys allegedly improperly received under it since 1980.

Due to factual differences between the West Virginia tax, challenged in *Armco, see* 104 S. Ct. at 2621-22, and the Washington tax, we do not believe the United States Supreme Court is requiring us to forge new commerce clause doctrine and disregard earlier decisions not overruled. We are unable to find such a command in the *Armco* decision. We are also troubled by the "free-rider" effect of Taxpayers' argument. As Taxpayers conceded at oral argument, their interpretation of *Armco* would force the State to forego taxing a substantial

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[1]The decision has already provoked considerable comment. *See* Judson & Duffy, *An Opportunity Missed: Armco, Inc. v. Hardesty, A Retreat from Economic Reality in Analysis of State Taxes,* 87 W. Va. L. Rev. 723 (1985); Lathrop, *Armco-A Narrow and Puzzling Test for Discriminatory State Taxes Under the Commerce Clause,* Taxes 551 (Aug. 1985); Lightburn & McArthur, *U.S. Supreme Court Ignores Unitary Issue in Armco, Inc. Opting for Discriminatory Finding,* 3 J. of St. Tax'n 211 (1984); Note, *A Call for Internal Consistency Among State Taxing Schemes: Armco, Inc. v. Hardesty,* 38 Tax Law. 519 (1985); *Sup. Ct. Holds West Virginia's Wholesale Gross Receipts Tax Unconstitutional,* Tax Adviser 487 (Aug. 1984); *West Virginia Gross Receipts Tax Discriminates Against Interstate Commerce,* 3 J. of St. Tax'n 143 (1984). (1984).

number of in-state transactions where state services had admittedly been furnished. This implies that a state, to make up the deficit, must impose a double tax burden on in-state manufacturer-wholesalers.

THE COMMERCE CLAUSE ISSUES

RCW 82.04.220 imposes, in general, a tax upon the privilege of engaging in business activities in Washington. The tax is measured by the application of rates against (1) the value of the products, (2) gross proceeds of sales, or (3) the gross income of the business, whichever is applicable. RCW 82.04.240 imposes a tax upon Washington manufacturers. RCW 82.04.270 taxes every person who sells products at wholesale in Washington. The disputed provision, RCW 82.04.440, provides that persons taxable under RCW 82.04.270 (wholesalers) shall not be taxed under RCW 82.04.240 (as local manufacturers). Thus, local manufacturers who wholesale their products strictly in Washington pay only the wholesaling tax. Further, a local extractor of a product who wholesales in Washington pays only the wholesaling tax, just as do out-of-state extractors. RCW 82.04.440. Under RCW 82.04.240, in-state manufacturers and extractors who sell their products out of state pay only the manufacturing tax, at a rate substantially identical to that paid by in-state wholesalers.

A state B & O tax must pass a 4-prong test to be valid under the commerce clause: (1) There must be a sufficient *nexus* or connection between the taxing state and the business taxes; (2) the tax must be *fairly apportioned;* (3) the tax cannot *discriminate* against interstate commerce in favor of local commerce; and (4) the tax must be *fairly related* to the services provided by the taxing state. *Complete Auto Transit, Inc. v. Brady,* 430 U.S. 274, 279, 51 L. Ed. 2d 326, 97 S. Ct. 1076 (1977). *Department of Rev. v. Association of Wash. Stevedoring Cos.,* 435 U.S. 734, 55 L. Ed. 2d 682, 98 S. Ct. 1388 (1978). Appellants contend that Washington's B & O tax fails the last three prongs of this test.

Because the heart of Taxpayers' complaint is that the statute fails the third prong, discrimination, that issue is addressed first. The second (fairly apportioned) and fourth (fairly related) prongs will be addressed together. Nexus is not at issue in this case, but is contested in the companion case. *See Tyler Pipe Indus., Inc. v. Department of Rev.*, 105 Wn.2d 318, _____ P.2d _____(1986).

A

DISCRIMINATION

A state's taxing scheme is discriminatory under the commerce clause if it grants a direct commercial advantage to local businesses or subjects interstate commerce to a risk of multiple tax burdens, to which strictly local commerce is not exposed. *See Boston Stock Exch. v. State Tax Comm'n*, 429 U.S. 318, 50 L. Ed. 2d 514, 97 S. Ct. 599 (1977); *Gwin, White & Prince, Inc. v. Henneford*, 305 U.S. 434, 83 L. Ed. 272, 59 S. Ct. 325 (1939). Any direct commercial advantage to local businesses inherent in Washington's B & O tax results from duplicative tax burdens; *e.g.*, the fact that strictly local businesses pay only one tax (either wholesale or manufacturing), while interstate businesses may possibly be subjected to one tax in this state and another tax at a different level of distribution in another state. Appellants contend that the recent Supreme Court decision, *Armco, Inc. v. Hardesty*,____ U.S.____, 81 L. Ed. 2d 540, 104 S. Ct. 2620 (1984), controls where there is a possibility of multiple-tax burdens and requires the invalidation of Washington's B & O tax.

In *Armco*, the Court invalidated West Virginia's gross receipts tax, under which local manufacturers were exempted from payment of the wholesale tax when they sold their locally manufactured products in West Virginia. Out-of-state manufacturers were required to pay the West Virginia wholesale tax when they sold their products in that state.

West Virginia's gross receipts tax is claimed to be the mirror image of Washington's present tax. West Virginia granted strictly local manufacturer-wholesalers an exemption

from its wholesale tax; Washington grants strictly local manufacturer-wholesalers an exemption from its manufacturing tax. Besides providing an exemption to taxpayers who have already paid one state excise tax, the two tax systems are similar in that they are gross receipts taxes.[2] Their points of difference, however, have become more noteworthy after the *Armco* decision. The West Virginia tax exacted substantially different tax rates on manufacturing (.27 percent) and wholesaling activities (.88 percent), which precluded the Court from finding that the wholesaling tax compensated for the manufacturing tax. *Armco,* 104 S. Ct. at 2623. By exacting substantially identical rates (.44 percent) for each activity, the Washington tax does not present the same obstacle to finding the taxes are compensatory.

In *Armco,* the Court held that West Virginia's tax facially discriminated against interstate commerce, 104 S. Ct. at 2622, because it provided that "two companies selling . . . property at wholesale . . . will be treated differently depending on whether the taxpayer conducts manufacturing in the State or out of it." *Armco,* 104 S. Ct. at 2622-23. The Court further determined that under the West Virginia tax scheme the manufacturing and wholesaling were not "substantially equivalent events" which would allow for the imposition of compensating taxes. *Armco,* 104 S. Ct. at 2623. It also noted that West Virginia did not allow for a proportionate reduction of its manufacturing tax when the manufactured goods were sold out of state, but did allow such a reduction when the goods were partly manufactured out of state. This was taken as evidence that the manufacturing tax was "not in part

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[2]The similarities were acknowledged by the Department when it was before the *Armco* Court. See *Armco,* 104 S. Ct. at 2624. In oral argument before this court, however, the Department stated that the *Armco* opinion, with its emphasis on the rates and measures of the West Virginia tax, makes the differences between the two states' taxes more significant than their similarities.

a proxy for the gross receipts tax imposed on Armco . . ." 104 S. Ct. at 2623.

While the Court did not explain what it meant by "substantially equivalent events, "[3] its reliance on *Maryland v. Louisiana,* 451 U.S. 725, 758-60, 68 L. Ed. 2d 576, 101 S. Ct. 2114 (1981) indicates a criterion to guide us in determining when the selling and wholesaling taxes would be deemed compensatory and therefore substantially equivalent. In *Maryland v. Louisiana, supra,* Louisiana claimed its first-use tax compensated for a severance tax the State had imposed on local natural gas production. The first use tax fell primarily on gas produced in the federal Outer Continental Shelf (OCS) and piped to Louisiana processing plants before being distributed to out-of-state consumers. The Court stated the 2-pronged criterion for determining compensatory taxes: (1) both taxes must be designed to meet the same ends; (2) local and interstate taxpayers similarly situated must receive equal treatment. 451 U.S. at 758-59.

The Louisiana tax failed on both prongs of the test. The purpose of the severance tax was to protect Louisiana's natural resources and compensate for their depletion. The first-use tax, however, could not be designed for that same purpose, "since Louisiana has no sovereign interest in being compensated for the severance of resources from the federally owned OCS land." 451 U.S. at 759. The Court also noted that Louisiana's first-use tax directly altered market forces in three impermissible ways: (1) certain local uses of OCS gas were exempted from the tax; (2) its credit system encouraged "natural gas owners involved in the production of OCS gas to invest in mineral exploration and development within

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[3]That the rate varies slightly for various types of businesses is not germane to the present issue. The variance comes from a subsequently enacted surtax. RCW 82.04.2904. Moreover, mathematical equality is not required. *General Am. Tank Car Corp. v. Day,* 270 U.S. 367, 373, 70 L. Ed. 635, 46 S. Ct. 234 (1926).

Louisiana" rather than continue to pursue out-of-state, *e.g.*, OCS, development; (3) the credit system also assured that in-state end users of OCS gas would be insulated from the cost increases resulting from the first-use tax. 451 U.S. at 757.

None of the skewed market behavior due to the Louisiana tax appears to have developed in West Virginia. The *Armco* Court, however, found that the lack of symmetry in the West Virginia tax structure demonstrated that the selling and manufacturing taxes did not share the same end. 104 S. Ct. at 2623. That West Virginia apportioned its manufacturing tax according to the percentage of in-state manufacturing a particular product represented, meant that West Virginia's selling tax could not be a substantially equivalent event for the manufacturing tax. In contrast, however, the flat rate character of the Washington taxes evidence the Legislature's intent to treat the two taxes as complementary and, therefore, compensatory.

Furthermore, the Washington B & O tax does not exhibit the infirmities that led the Court in *Maryland v. Louisiana, supra,* to conclude the first-use tax could not be a compensatory tax for the state's severance tax. The Washington B & O tax is designed to tax the privilege of engaging in business activity *within* the state. RCW 82.04.220. Both the selling and the manufacturing taxes are exacted to address the same state burdens attendant on granting such a privilege. All who engage in selling activity within Washington pay the selling B & O tax, while those in-state manufacturers who sell out of state are taxed on their manufacturing activity. Each Taxpayer is taxed only once, at a substantially uniform rate,[4]

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[4]By way of example, the Court did suggest that sale and use taxes fell on substantially equivalent events. Other than representing activities farther downstream in the distribution chain, we do not see an economically significant difference between "sale and use" and "manufacturing and sale." *Complete Auto Transit, Inc. v. Brady,* 430 U.S. 274, 51 L. Ed. 2d 326, 97 S. Ct. 1076 (1977) requires some relationship between a legal distinction and "economic realities." 430 U.S. at 279.

unlike West Virginia, for the privilege of doing business in Washington.

Nor does the tax exhibit a discriminatory impact. Unlike the Louisiana tax, the market forces are not altered by the incidence of the tax. In-state manufacturers selling out of state do not gain a tax advantage by shifting sales of their product to the local market. Similarly, out-of-state manufacturers selling in state gain no tax advantage by moving their manufacturing operations in state. Also in contrast with the Louisiana tax is the fact that in-state consumers are not insulated from the price effects of the tax on the goods.

We are further persuaded that the Washington tax is valid because it is conceptually identical to the pre-1968 New York stock transfer tax the Court endorsed in *Boston Stock Exch. v. State Tax Comm'n,* 429 U.S. 318, 50 L. Ed. 2d 514, 97 S. Ct. 599 (1977) which was in turn reaffirmed in *Armco,* 104 S. Ct. at 2622. *Boston Stock Exchange* involved New York's attempt to keep the New York Stock Exchange by amending the stock transfer tax so that nonresidents who completed transfers entirely in New York paid a lower tax than would residents, and that transfers occurring entirely within New York could only be taxed to a maximum of $300, while there was no ceiling on other transfers. The tax was patently discriminatory and, unlike the B & O tax, was not part of a larger tax structure. The Court, however, spoke favorably of the unamended statute that taxed residents and nonresidents alike on one of several taxable stock transactions that could occur within the state. For both kinds of taxpayers, "the occasion of the tax was the occurrence of at least one taxable event in the State, the rate of tax was based solely on the price of the securities, and the total tax was determined by the number of shares sold." 429 U.S. at 322-23.

The *Armco* Court relied heavily upon the *Boston Stock Exchange* case as authority for striking down the West Virginia tax. *Boston Stock Exchange*'s favorable treatment of the pre-1968 amendments, *see* 429 U.S. at 330, and the apparent centrality of that holding to *Armco* requires harmonization of the two opinions. The incongruities between

Taxpayers' reading of *Armco* and earlier, well established commerce clause cases, *see, e.g., Commonwealth Edison Co. v. Montana,* 453 U.S. 609, 69 L. Ed. 2d 884, 101 S. Ct. 2946 (1981); *Complete Auto; Boston Stock Exchange,* makes us reluctant to extend *Armco* as Taxpayers urge. There is a disturbing formalism in their argument that manufacturing and wholesaling are never "substantially equivalent events." To read *Armco* thusly would foreclose analyzing a taxpayer's burden in light of both the structure of the relevant tax system and its effect on a single economic unit. Appellants' argument would force us to regard the gross receipts tax system as consisting of two separate taxes, manufacturing and selling, and to retreat from the *Complete Auto* "practical effects" test which *Armco* does not overrule or claim to modify. *Complete Auto Transit, Inc. v. Brady,* 430 U.S. 274, 51 L. Ed. 2d 326, 97 S. Ct. 1076 (1977). To do so would be to ignore the "economic realities," 430 U.S. at 279, that a business unit frequently operates at several levels in the distribution chain and the costs of those various operations come to bear on the single product which serves as the measure of taxation. *See also* Judson & Duffy, *An Opportunity Missed: Armco, Inc. v. Hardesty, A Retreat from Economic Reality in Analysis of State Taxes,* 87 W. Va. L. Rev. 723, 741 (1985); Lathrop, *Armco—A Narrow and Puzzling Test for Discriminatory State Taxes Under the Commerce Clause,* Taxes 551, 552, 559 (Aug. 1985).

Similarly, to avoid other incongruities posed by Taxpayers' arguments, we do not read *Armco* as requiring that the "internal consistency" requirement be applied to determine discrimination. The concept, "internal consistency," originated in the fair apportionment analysis of a multi-state net income tax case, *Container Corp. of Am. v. Franchise Tax Bd.,* 463 U.S. 159, 169, 77 L. Ed.2d 545, 103 S. Ct. 2933 (1983), and its applicability to gross receipts tax cases has been questioned. *See* Lathrop, at 557. Nevertheless, the concept seems to have been used only to determine whether Armco Inc., had to show actual harm once it had demonstrated the tax provision was facially discriminatory. *See* Judson &

Duffy, 87 W. Va. L. Rev. at 739. As we have previously discussed, however, Washington's tax is not facially discriminatory. We note further that the Court, were it to have grafted the concept onto the discrimination prong, would have obscured the *Complete Auto* test by treating the "multiple taxation" apportionment prong as a discrimination problem. Reflecting its greater complexity, the "fair apportionment" prong has been subject to more generous standards than has the discrimination prong. *See, e.g. Container Corp.,* 463 U.S. at 170; *Moorman Mfg. v. Bair,* 437 U.S. 267, 278, 57 L. Ed. 2d 197, 98 S. Ct. 2340 (1978).

Because the West Virginia and Washington taxes differ significantly, we must reject appellants' argument and rely on the long history of the United States Supreme Court's treatment of this state's gross receipts tax as having withstood commerce clause challenges, *see Department of Rev. v. Association of Wash. Stevedoring Cos.,* 435 U.S. 734, 55 L. Ed. 2d 682, 98 S. Ct. 1388 (1978); *Standard Pressed Steel Co. v. Department of Rev.,* 419 U.S. 560, 42 L. Ed. 2d 719, 95 S. Ct. 706 (1975); *General Motors Corp. v. Washington,* 377 U.S. 436, 12 L. Ed. 2d 430, 84 S. Ct. 1564 (1964); *Chicago Bridge & Iron Co. v. Department of Rev.,* 98 Wn.2d 814, 659 P.2d 463, *appeal dismissed,* 464 U.S. 1013 (1983); *Crown Zellerbach Corp. v. State,* 45 Wn.2d 749, 278 P.2d 305 (1954); *B.F. Goodrich Co. v. State,* 38 Wn.2d 663, 231 P.2d 325, *cert. denied,* 342 U.S. 876, 96 L. Ed. 659, 72 S. Ct. 167 (1951), as well as the general development of commerce clause analysis from *Complete Auto* to *Armco. See, e.g., Container Corp. of Am. v. Franchise Tax Bd., supra; Commonwealth Edison Co. v. Montana, supra; Maryland v. Louisiana, supra; Moorman Mfg. Co. v. Bair, supra.* Under these two lines of precedent, we do not find the tax discriminatory.

B

FAIR APPORTIONMENT; TAX FAIRLY RELATED TO SERVICES PROVIDED BY THE STATE.

Taxpayers also claim that Washington's B & O tax violates the commerce clause because it is not fairly apportioned to reflect the amount of business conducted here, and it is not fairly related to the services rendered by Washington. As a result, Taxpayers complain that they are unfairly taxed upon more than 100 percent of their incomes. Hence, under the second and fourth prongs of the *Complete Auto* test, Taxpayers claim that interstate businesses are improperly subjected to multiple-tax burdens.

1. Fair Apportionment

Most apportionment cases have arisen in challenges to state income taxes where the income of a unitary multi-state business comes from a variety of tax jurisdictions. As Judson and Duffy note, a B & O tax on business activity within the state does not present the same difficulty in determining a nexus between business activity and the tax jurisdiction. Judson & Duffy, 87 W. Va. L. Rev. at 728. Moreover, even in the income tax cases, the Court has afforded legislatures a generous standard. In *Exxon Corp. v. Wisconsin Dep't. of Rev.,* 447 U.S. 207, 219-20, 65 L. Ed. 2d 66, 100 S. Ct. 2109 (1980), the Court looked only to whether there was " 'a rational relationship between the income attributed to the State and the intrastate values of the enterprise.' " *See also, e.g., Container Corp of Am. v. Franchise Tax Bd., supra.* Earlier, the *Moorman* Court had refused to require Iowa to employ the favored 3-factor test, urged here by Taxpayers, instead of its single-factor test for apportioning interstate commerce income. To disturb the formula, the taxpayers in *Moorman* would have to show by " 'clear and cogent evidence' that the income attributed to the State is in fact 'out of all appropriate proportions to the business transacted . . . in that State' . . . or has 'led to a grossly distorted result'. . . " 437 U.S. at 274.

The mere threat that income not generated in the state will be taxed under a formula does not make the formula constitutionally defective. 437 U.S. at 278. Congress, not the Court, must enact national uniform rules for the division of income if it finds duplicative taxation a problem. 437 U.S. at 279.

Washington's B & O tax has been held to be fairly apportioned in previous cases. *See Department of Rev. v. Association of Wash. Stevedoring Cos., supra; Standard Pressed Steel Co. v. Department of Rev., supra; Chicago Bridge & Iron Co. v. Department of Rev., supra.* Nonetheless, Taxpayers urge that, under *Armco,* the tax must now pass the "internal consistency" test articulated in *Container Corp. of Am. v. Franchise Tax Bd., supra,* and cited in *Armco.* In applying that test, the court must hypothesize that every jurisdiction has adopted a tax identical to the tax in question; the result must be that no more than 100 percent of a single business's income is taxed by one state.

We agree with the Department that the "internal consistency" test articulated in *Container Corp.* and *Armco* does not apply to the determination whether the B & O tax is fairly apportioned. This is because Washington does not tax the income of a unitary business, but rather taxes only the privilege of manufacturing or selling within the state. Thus, respondent urges that Washington's tax is apportioned by "allocation"; that is, the tax is applied only to the value of products manufactured in Washington or to the gross proceeds of sales in Washington.

We do not read the *Armco* opinion to apply its "internal consistency" test to the question of whether a state gross receipts tax is fairly apportioned. We believe that it does not apply not only because of the appeal of the Department's argument, but because the *Armco* Court said nothing about the status of *Washington Stevedoring. See* 435 U.S. 734. If the "internal consistency" requirement applied to the fair apportionment prong, *Washington Stevedoring* should be overruled for requiring a showing of actual harm to make out unfair apportionment. 435 U.S. at 746 & n.16. Further, speaking specifically of the tax challenged here, the Court said,

"[w]hen a general business tax levies only on the value of services performed within the State, the tax is properly apportioned and multiple burdens logically cannot occur." 435 U.S. at 746-47.

2. Fairly Related

The *Armco* Court did not address the "fairly related to state services" prong. The controlling case is *Commonwealth Edison Co. v. Montana,* 453 U.S. 609, 69 L. Ed. 2d 884, 101 S. Ct. 2946 (1981). Certain Montana coal producers and their out-of-state customers argued that they should be permitted to show that the state's high coal severance tax was not fairly related to state services provided. The Court refused to view the fair relation test as a cost-benefit analysis of the taxes paid and services received. The test is basically a nexus test, with "the additional limitation that the *measure* of the tax must be reasonably related to the extent of the [taxpayer's] contact" with the state. 453 U.S. at 626. The Court declined to determine what a reasonable measure might be because (1) no usable legal test could adequately reflect the varied considerations that "inform a decision about an acceptable rate or level of state taxation", 453 U.S. at 628; and, hence, (2) this is a question more suited to the political process. The taxpayer's "substantial privilege of mining coal" provided sufficient nexus and the only benefit the state needed to show was that the taxpayer enjoyed the "privileges of living in an organized society, established and safeguarded by the devotion of taxes to public purposes." 453 U.S. at 629. *See also Japan Line, Ltd. v. County of Los Angeles,* 441 U.S. 434, 60 L. Ed. 2d 336, 99 S. Ct. 1813 (1979).

Manufacturing, or wholesaling, would also appear to be privileges comparable to mining so that the nexus requirement is sufficiently met in the present case. Despite any warts Washington may suffer, the State can show that ours is "an organized society." While local manufacturer-sellers enjoy "two activities for the price of one", interstate businesses cannot, under this prong, apply a cost-benefit analysis to show how they have been short-changed.

We believe the Washington B & O tax continues to meet commerce clause standards. We do not believe *Armco* requires the result urged by appellants and can be reconciled with compelling precedent not overruled in *Armco* and with scholarly commentary. We also believe the controlling facts in *Armco* differ significantly from those before us. The trial court is affirmed.

IN THE SUPREME COURT OF
THE STATE OF WASHINGTON

NATIONAL CAN CORPORATION, *et al.*,
Appellants,

v.

STATE OF WASHINGTON,
DEPARTMENT OF REVENUE,
Respondent.

No. 51910-2
Thurston County No. 84-2-01900-7
MANDATE

The State of Washington to: The Superior Court of the State of Washington in and for Thurston County

This is to certify that the opinion of the Supreme Court of the State of Washington filed on March 6, 1986, became the decision terminating review of this court in the above entitled case on March 26, 1986. This cause is mandated to the superior court from which the appeal was taken for further proceedings in accordance with the attached true copy of the opinion.

Pursuant to Rule of Appellate Procedure 14.3, costs are taxed as follows: $1,264.66 in favor of respondent State of Washington, Department of Revenue and against appellants National Can Corporation, et al.

[seal]

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Court at Olympia, this 27th day of March, A.D. 1986

/s/ Reginald N. Shriver
Clerk of the Supreme Court, State of Washington

Appendix B

OPINION OF THE SUPERIOR COURT OF THURSTON COUNTY, WASHINGTON

IN THE SUPERIOR COURT
OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF THURSTON

KALAMA CHEMICAL, INC.,
Plaintiff,

v.

STATE OF WASHINGTON,
DEPT. OF REVENUE,
Defendant.
NO. 84-2-01891-4

XEROX CORPORATION,
Plaintiff,

v.

STATE OF WASHINGTON,
DEPT. OF REVENUE,
Defendant.
NO. 84-2-01916-3

NATIONAL CAN CORPORATION,
Plaintiff,

v.

STATE OF WASHINGTON,
DEPT. OF REVENUE,
Defendant.
NO. 84-2-01900-7

MEMORANDUM OPINION

[Entered June 28, 1985]

These cases, respectively, challenge the constitutionality of the manufacturing (RCW 82.04.240)[1], wholesaling (RCW 82.04.270)[2], and retailing (RCW 82.04.250)[3] taxing aspects of the business and occupation taxing statute of the state of Washington (RCW Ch. 82.04). The crux of the respective challenges turns, to some extent, upon the multiple activities' exemption set forth in RCW 82.04.440[4], and primarily, upon the impact of the decision of the United States Supreme Court in *Armco v. Hardesty*,__US__, 81 L.Ed. 2d 540, 104 S.Ct. 2620 (1984).

The essential facts are undisputed.

The rate and measure of the manufacturing, wholesaling

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[1]RCW 82.04.240. "Upon every person . . . engaging in this state in business as a manufacturer; as to such persons the amount of the tax with respect to such business shall be equal to the value of the products, including by products manufactured, multiplied by the rate of forty-four one-hundredths of one percent." Under RCW 82.04.450 "value of the products" is determined by the "gross proceeds derived from the sale thereof."

[2]RCW 82.04.270. "(1) Upon every person . . . engaging within this state in the business of making sales at wholesale; as to such persons the amount of tax with respect to such business shall be equal to the gross proceeds of sales of such business multiplied by the rate of forty-four one-hundredths of one percent. . ."

[3]RCW 82.04.250. "Upon every person . . . engaging within this state in the business of making sales at retail, as to such persons, the amount of tax with respect to such business shall be equal to the gross proceeds of sales of the business, multiplied by the rate of forty-four one-hundredths of one percent."

[4]RCW 82.04.440. "Every person engaged in activities which are within the purview of the provisions of two or more of sections RCW 82.04.230 to RCW 82.04.290, inclusive, shall be taxable under each paragraph applicable to the activities engaged in: *Provided,* That persons taxable under RCW 82.04.250 [retailing] or 82.04.270 [wholesaling] shall not be taxable under . . . RCW 82.04.240 [manufacturing] . . . with respect to . . . manufacturing of the products so sold. . ."

and retailing taxes are the same, i.e., .0044 of 1% of gross proceeds of product sales.

Plaintiff Kalama Chemical, Inc. (hereafter Kalama) manufactures chemical products within the state of Washington, which products it sells both in and out of state. For these purposes Kalama employs some 95 people within the state consisting of management, administrative and manufacturing personnel.

In keeping with the multiple exemption statute (footnote 4) Kalama pays only a wholesaling or retailing tax on the products sold in state. On the products sold out of state, Kalama is assessed and has paid the manufacturing tax. Kalama also pays unspecified amounts of taxes to other states based on income from the sale of its products therein manufactured in Washington.

Kalama challenges imposition of the manufacturing tax.

Xerox Corporation (hereafter Xerox) manufactures office equipment in other states, some of which it imports and sells in the state of Washington. To this latter end Xerox has 460 employees in this state, consisting of sales representatives, service technicians and administrative personnel, and locally maintains sales and service offices and a products demonstration center. Upon its product sales in this state Xerox has paid the wholesaling or retailing tax. Xerox has also paid proportioned income taxes to other jurisdictions, in unspecified amounts, based on its sales in Washington.

Xerox challenges the constitutionality of the wholesaling or retailing tax imposed upon its sales in this state.

National Can Corporation (hereafter National) manufactures and sells packaging products. Some of these products are manufactured in the state of Washington and sold outside of this state and some are manufactured in other states and sold in the state of Washington. On the products manufactured in this state and sold outside the state, National, like Kalama, is assessed and has paid the manufacturing tax. On the products manufactured elsewhere and sold within this state National, like Xerox, has paid the wholesaling or

retailing tax.

National challenges both tax impositions. All challenges contend the respective tax impositions constitute restraints on interstate commerce in violation of the Commerce Clause of the United States Constitution (Art. I, Sec. 8, Cl. 3).

A review of the maze of United States Supreme Court decisions revolving about asserted state taxing violations of the Commerce Clause reveals at least three applicable general principles:

1. Interstate commerce must bear its fair share of the cost of state government and the services and benefits provided thereby, even though such may increase the cost of engaging in interstate commerce. *Western Live Stock v. Bureau of Revenue,* 303 U.S. 250, 82 L.Ed.823, 58 S. Ct. 546 (1938).

2. A state may encourage, through its taxing system, the growth of intrastate industry, and may compete with other states for a share of interstate commerce so long as it does not provide a direct commercial advantage to local business. *Boston Stock Exchange v. State Tax Commn.,* 429 U.S. 318, 50 L.Ed. 2d 514, 97 S. Ct. 599 (1977); *Maryland v. Louisiana,* 451 U.S. 725, 68 L.Ed. 2d 576, 101 S. Ct. 2114 (1981); *Bacchus Imports, Ltd. v. Dias,*__U.S.__,82 L.2d 2d 209, 104 S.Ct. 3049 (1984).

3. For a state to constitutionally impose a tax on interstate activities, there must be: (a) a sufficient nexus between the interstate activities and the taxing state; (b) a fair apportionment of the tax in relation to the taxpayer's activities within the taxing state; (c) no tax discrimination between intrastate and interstate transactions; and, (d) a fair relationship to services and protections afforded the taxpayer by the taxing state. *Complete Auto Transit, Inc. v. Brady,* 430 U.S. 274, 51 L.Ed. 2d 326, 97 S.Ct. 1076 (1977).

Plaintiffs do not contest these general principles. Rather, they contend that by their decision in *Armco v. Hardesty, supra,* the United States Supreme Court has added new dimensions to the technique of ascertaining whether a state tax on gross proceeds discriminates between intrastate and

interstate commerce.

First, plaintiffs contend the taxing scheme invalidated in *Armco* is essentially identical to this state's taxing program here under attack, *ergo, Armco* is dispositive.

This court cannot entirely agree with plaintiff's assertions. A significant difference does exist. It is to be noted that the West Virginia tax provisions stricken in *Armco,* imposed no selling tax on in-state manufacturers selling intrastate, while exacting such a tax from out-of-state manufacturer selling in West Virginia, whereas, this state imposes an equal selling tax on local sales whether made by in-or-out-of-state manufacturers. Compare *Columbia Steel Co. v. State,* 30 Wn. 2d 658, 192 P.2d 976 (1948) and *B.F. Goodrich v. State,* 38 Wn.2d 663, 231 P.2d 325 (1951), cert. denied 342 U.S. 876, 96 L.Ed. 659, 72 S. Ct. 167 (1951).

Plaintiffs next contend that Washington's taxing scheme, like West Virginia's, is facially discriminatory and/or internally inconsistent in relation to interstate transactions. Kalama and National contend this is so because they must bear a manufacturing tax on locally manufactured products which they sell out of state while local manufacturers selling only in state are exempt from the manufacturers tax. Xerox and National contend that they are or may be subject to a manufacturing or other tax in their home states, and thereafter must pay the wholesaling tax on merchandise sold in the state of Washington. Plaintiffs respectively contend the net result of the situations thus projected is a form of multiple taxation anathematic to the Commerce Clause.

Again, this court must disagree. It appears that the last paragraph of the *Armco* decision effectively dissipates plaintiffs' arguments in this respect. The Supreme Court there states:

> "It is true, as the State of Washington appearing as amicus curiae points out, that Armco would be faced with the same situation that it complains of here if Ohio (or some other state) imposed a tax only upon manufacturing, while West Virginia imposed a tax only on wholesaling. In that situation Armco would bear two taxes, while West Virginia sellers would bear only one.

But such a result would not arise from impermissible discrimination against interstate commerce but from fair encouragement of in-state business. What we said in *Boston Stock Exchange,* 429 U.S. at 336-337 is relevant here as well.

> "Our decision today does not prevent the states from structuring their tax systems to encourage the growth and development of intrastate commerce and industry. Nor do we hold that a state may not compete with other states for a share of interstate commerce; such competition lies at the heart of a free trade policy. We hold only that in the process of competition no state may discriminatorily tax the products manufactured or the business operations performed in any other state."

Plaintiffs next contend that the respective taxes are not fairly apportioned.

With respect to the manufacturing tax the *Armco* court, in a footnote (No. 6), pointed to *Complete Auto Transit Inv.* [sic] *v. Brady, supra,* and observed that a manufacturing tax might logically be expected to be larger than a gross receipts tax, since an in-state manufacturing benefits more from the services provided by the state than does a transient wholesaler. Noteably, too, the Supreme Court of this state has upheld our manufacturing tax against varying attacks of inadequate or lack of apportionment. *Crown Zellerbach Corp. v. State,* 45 Wn.2d 749, 278 P.2d 305 (1954); *Crown Zellerback* [sic] *Corp. v. State,* 53 Wn.2d 813, 328 P.2d 884 (1958); *St. Regis Paper Co. v. State,* 63 Wn.2d 564, 388 P.2d 520 (1964); *Reynolds Metals Company v. State,* 65 Wn.2d 882, 400 P.2d 310 (1965) (app. dismissed 382 U.S. 160, 15 L.Ed. 2d 228, 86 S.Ct. 315); *P.U.D No. 2 of Grant Cy. v. State,* 82 Wn.2d 232, 510 P.2d 206 (1973).

To the same effect, only on a broader scale, including apportionment to some extent, the United States Supreme Court, as well as our State Supreme Court, has upheld the constitutional validity of our wholesaling and/or retailing

tax. *General Motors s. Washington,* 377 Wash. 436, 12 L.2d. 2d 430, 84 S.Ct. 1564 (1964) [sic]; *Standard Pressed Steel v. Department of Revenue,* 419 U.S. 560, 42 L.Ed. 2d 719, 95 S.Ct. 706 (1975); *B.F. Goodrich v. State,* 38 Wn.2d 663, 231 P.2d 325 (1951) (certc. [sic] denied 342 U.S. 876, 96 L.Ed. 659,72 S.Ct. 167); *U.S. Steel Corp. v. State,* 51 Wn.2d 224, 316 P.2d 1099 (1957) (appeal dismissed 358 U.S. 46, 3 L.Ed. 2d 44, 79 S.Ct. 40 (1958); *Fiberboard Paper Prods. Corp. v. State,* 66 Wn.2d 87, 401 P.2d 623 (1965); *Chicago Bridge & Iron Co. v. Dept. of Revenue,* 98 Wn.2d 814, 659 P.2d 463 (1983).

This Court does not believe that the United States Supreme Court in *Armco* undertook a significant retreat, by implication or otherwise, from *General Motors Corp. v. Washington, supra.* Neither does it appear that the injection of such theories as "internal consistency," "facial discrimination," or "substantially equivalent events," when cast against the backdrop of this state's challenged tax structure, produce the result sought by respective plaintiffs.

Furthermore, it is beyond the province of this court to modify oroverrule [sic] extant and applicable decisions of this state's Supreme Court.

Plaintiffs Motion for Summary Judgment is accordingly denied. The state's prayer for dismissal is granted.

Dated June 24, 1985.

/s/ ORRIS HAMILTON
Superior Court Judge Pro Tem

Appendix C

JUDGMENT OF THE SUPERIOR COURT OF THURSTON COUNTY, WASHINGTON

IN THE SUPERIOR COURT OF
WASHINGTON FOR THURSTON COUNTY

NATIONAL CAN CORPORATION, et al.,
A Consolidated Action,
Plaintiffs,

vs.

STATE OF WASHINGTON,
DEPARTMENT OF REVENUE,
Defendant.

NO. 84-2-01900-7
SUMMARY JUDGMENT

I.

HEARING

1.1 **Date.** May 22, 1985.

1.2 **Notice of Hearing.** Hearing was upon proper notice, it being agreed by the parties that there was no genuine issue of material fact and that the matter would be heard on cross motions for summary judgment.

1.3 **Appearances.** John T. Piper and D. Michael Young of Bogle & Gates for the plaintiffs, and Kenneth O. Eikenberry, Attorney General, and William B. Collins and Leland T. Johnson, Assistant Attorneys General, for the defendant.

1.4 **Purpose.** To consider plaintiffs' and defendant's cross motions for summary judgment.

1.5 **Record Before The Court.** The record before the Superior Court consisted of the following documents:

(a) The Consolidated Plaintiff's Complaints for Refund of Taxes

(b) The Consolidated Plaintiffs' First Amended Complaints for Refund of Taxes

(c) Stipulation of Facts Concerning National Can Corporation
(d) Stipulation of Facts Concerning Xerox Corporation
(e) Stipulation of Facts Concerning Kalama Chemical, Inc.
(f) Affidavit of Ted W. Palmer
(g) Affidavit of Thomas J. Wenglein
(h) Affidavit of Edward R. McMillan
(i) Affidavit of Lyle Jacobsen
(j) Affidavit of Glenn Harris
(k) Affidavit of William B. Collins
(l) Affidavit of Gary O'Neil, dated May 20, 1985
(m) Affidavit of Donn Smallwood
(n) Affidavit of Leland T. Johnson
(o) Affidavit of Daniel Keller
(p) Stipulation of Exhibits and the exhibits described therein
(q) Affidavits of John T. Piper in The Consolidated Cases
(r) Affidavits of Susan Lehr in The Consolidated Cases
(s) Affidavits of Franklin G. Dinces in The Consolidated Cases
(t) Affidavit of Franklin G. Dinces in Support of Plaintiffs' Motion to Compel Production of Documents by Defendant
(u) Second Stipulation Re: Pending Claims

II.

FINDINGS

The Court having considered the record before it and the briefs and arguments of counsel finds:

2.1 **Consolidation.** This action is comprised of 53 separate actions which were consolidated by Order of this Court dated July 19, 1985. Based on the Order for Consolidation this judgment shall apply to each of the consolidated cases.

2.2 **No Issue of Fact.** There is no genuine issue as to any material fact in this case.

2.3 **Judgment.** The State of Washington, Department of Revenue, is entitled to judgment as a matter of law.

III.

ORDER AND JUDGMENT

On the basis of the foregoing Findings and in accordance with this Court's Memorandum Opinion dated June 24, 1985, it is ORDERED, ADJUDGED AND DECREED that:

3.1 The imposition of Washington's business and occupation tax as applied to the plaintiffs does not violate the Commerce Clause, Art. I, § 8, cl. 3 of the United States Constitution.

3.2 The defendant's Motion for Summary Judgment is granted.

3.3 The plaintiffs' Motion for Summary Judgment is denied.

DONE this 19th day of July, 1985.

/s/ Orris L. Hamilton
ORRIS L. HAMILTON
Superior Court Judge Pro Tem

Presented by:

/s/ William B. Collins
Wiiliam B. Collins
Assistant Attorney General
Attorney for Defendant.

Approved as to Form;
Notice of Presentation Waived:
/s/ John T. Piper
John T. Piper
Attorney for Plaintiffs

IN THE SUPERIOR COURT OF WASHINGTON
FOR THURSTON COUNTY

NATIONAL CAN CORPORATION,
Plaintiff,

vs.

STATE OF WASHINGTON,
DEPARTMENT OF REVENUE,
Defendant.

NO. 84-2-01900-7

XEROX CORPORATION,
Plaintiff,

vs.

STATE OF WASHINGTON,
DEPARTMENT OF REVENUE,
Defendant.

NO. 84-2-01916-3

KALAMA CHEMICAL, INC.,
Plaintiff,

vs.

STATE OF WASHINGTON,
DEPARTMENT OF REVENUE,
Defendant.

NO. 84-2-01891-4

STIPULATION AND ORDER
FOR CONSOLIDATION

C-5

A.H. ROBINS COMPANY, INC.,
Plaintiff,

vs.

STATE OF WASHINGTON,
Defendant.

NO. 84-2-01921-0

ADVANCED TECHNOLOGY LABORATORIES, INC.,
Plaintiff,

vs.

STATE OF WASHINGTON,
DEPARTMENT OF REVENUE,
Defendant.

NO. 84-2-01911-2

ALASKAN COPPER COMPANIES, INC.,
Plaintiff,

vs.

STATE OF WASHINGTON,
DEPARTMENT OF REVENUE,
Defendant.

NO. 85-2-00863-1

C-6

ALLIS-CHALMERS CORPORATION,
Plaintiff,

vs.

STATE OF WASHINGTON,
DEPARTMENT OF REVENUE,
Defendant.

NO. 84-2-01924-4

ALPAC CORPORATION,
Plaintiff,

vs.

STATE OF WASHINGTON,
DEPARTMENT OF REVENUE,
Defendant.

NO. 85-2-00870-4

AMF, INCORPORATED, et al.,
Plaintiffs,

vs.

STATE OF WASHINGTON,
DEPARTMENT OF REVENUE,
Defendant.

NO. 84-2-01898-1

C-7

AMERICAN CYANAMID COMPANY, et al.,
Plaintiffs,

vs.

STATE OF WASHINGTON,
DEPARTMENT OF REVENUE,
Defendant.

NO. 84-2-01890-6

ARMSTRONG WORLD INDUSTRIES, INC., et al.,
Plaintiffs,

vs.

STATE OF WASHINGTON,
DEPARTMENT OF REVENUE,
Defendant.

NO. 84-2-01922-8

ASC PACIFIC, INC.,
Plaintiff,

vs.

STATE OF WASHINGTON,
DEPARTMENT OF REVENUE,
Defendant.

NO. 84-2-01926-1

C-8

BASIC AMERICAN FOODS, INC.,
aka AMPCO FOODS, INC.,
Plaintiff,

vs.

STATE OF WASHINGTON,
DEPARTMENT OF REVENUE,
Defendant.

NO. 84-2-01901-5

BETHLEHEM STEEL CORPORATION,
Plaintiff,

vs.

STATE OF WASHINGTON,
DEPARTMENT OF REVENUE,
Defendant.

NO. 84-2-01926-1

CHRYSLER CORPORATION,
Plaintiff,

vs.

STATE OF WASHINGTON,
DEPARTMENT OF REVENUE,
Defendant.

NO. 84-2-01889-2

CLARK EQUIPMENT COMPANY,
Plaintiff,

vs.

STATE OF WASHINGTON,
DEPARTMENT OF REVENUE,
Defendant.

NO. 84-2-01909-1

COMINCO AMERICAN, INC., et al.,
Plaintiffs,

vs.

STATE OF WASHINGTON,
DEPARTMENT OF REVENUE,
Defendant.

NO. 84-2-01904-0

CUMMINS ENGINE COMPANY, INC.,
Plaintiff,

vs.

STATE OF WASHINGTON,
DEPARTMENT OF REVENUE,
Defendant.

NO. 84-2-01912-1

DATA I/O CORPORATION,
Plaintiff,

vs.

STATE OF WASHINGTON,
DEPARTMENT OF REVENUE,
Defendant.

NO. 84-2-01893-1

FENTRON BUILDING PRODUCTS CO.,
Plaintiff,

vs.

STATE OF WASHINGTON,
Defendant.

NO. 84-2-01907-4

THE FIRESTONE TIRE & RUBBER CO.,
Plaintiff,

vs.

STATE OF WASHINGTON,
DEPARTMENT OF REVENUE,
Defendant.

NO. 85-2-00864-0

FORD MOTOR COMPANY,
Plaintiff,

vs.

STATE OF WASHINGTON,
DEPARTMENT OF REVENUE,
Defendant.

NO. 84-2-01895-7

FOSECO, INC.,
Plaintiff,

vs.

STATE OF WASHINGTON,
DEPARTMENT OF REVENUE,
Defendant.

NO. 84-2-01930-9

G. HEILEMAN BREWING CO., INC.,
and RAINIER BREWING CO.,
Plaintiffs,

vs.

STATE OF WASHINGTON,
DEPARTMENT OF REVENUE,
Defendant.

NO. 84-2-01923-6

GENERAL BREWING COMPANY,
Plaintiff,

vs.

STATE OF WASHINGTON,
DEPARTMENT OF REVENUE,
Defendant.

NO. 84-2-01915-5

GENERAL ELECTRIC COMPANY,
Plaintiff,

vs.

STATE OF WASHINGTON,
Defendant.

NO. 85-2-00865-8

HEATH TECNA AEROSPACE CO.,
Plaintiff,

vs.

STATE OF WASHINGTON,
Defendant.

NO. 84-2-01908-2

HONEYWELL, INC.,
Plaintiff,

vs.

STATE OF WASHINGTON,
DEPARTMENT OF REVENUE,
Defendant.

NO. 85-2-00866-6

INTERNATIONAL PAPER COMPANY,
Plaintiff,

vs.

STATE OF WASHINGTON,
DEPARTMENT OF REVENUE,
Defendant.

NO. 84-2-01888-4

KORRY ELECTRONICS CO.,
Plaintiff,

vs.

STATE OF WASHINGTON,
Defendant.

NO. 84-2-01892-2

LONE STAR INDUSTRIES, INC.,
Plaintiff,

vs.

STATE OF WASHINGTON,
DEPARTMENT OF REVENUE,
Defendant.

NO. 84-2-01903-1

LONGVIEW FIBRE COMPANY,
Plaintiff,

vs.

STATE OF WASHINGTON,
DEPARTMENT OF REVENUE,
Defendant.

NO. 84-2-01917-1

MARS, INC., et al.,
Plaintiffs,

vs.

STATE OF WASHINGTON,
DEPARTMENT OF REVENUE,
Defendant.

NO. 85-2-00919-1

E.M. MATSON, JR.,
d/b/a E.M. MATSON JR., CO.,
Plaintiff,

vs.

STATE OF WASHINGTON,
DEPARTMENT OF REVENUE,
Defendant.

NO. 84-2-01920-1

MATTEL, INC.,
Plaintiff,

vs.

STATE OF WASHINGTON,
DEPARTMENT OF REVENUE,
Defendant.

NO. 84-2-01931-7

MILLER BREWING COMPANY,
Plaintiff,

vs.

STATE OF WASHINGTON,
DEPARTMENT OF REVENUE,
Defendant.

NO. 84-2-01913-9

MURRAY PACIFIC CORPORATION, INC.,
Plaintiff,

vs.

STATE OF WASHINGTON,
DEPARTMENT OF REVENUE,
Defendant.

NO. 85-2-00921-2

NOEL CANNING CORPORATION,
Plaintiff,

vs.

STATE OF WASHINGTON,
DEPARTMENT OF REVENUE,
Defendant.

NO. 84-2-01928-7

NORTH PACIFIC PROCESSORS, INC., et al.,
Plaintiffs,

vs.

STATE OF WASHINGTON,
DEPARTMENT OF REVENUE,
Defendant.

NO. 84-2-01925-2

PABST BREWING COMPANY and
OLYMPIA BREWING COMPANY,
Plaintiffs,

vs.

STATE OF WASHINGTON,
DEPARTMENT OF REVENUE,
Defendant.

NO. 84-2-01918-0

PETER PAN SEAFOODS, INC.,
Plaintiff,

vs.

STATE OF WASHINGTON,
DEPARTMENT OF REVENUE,
Defendant.

NO. 84-2-01902-3

QUINTON INSTRUMENT COMPANY,
Plaintiff,

vs.

STATE OF WASHINGTON,
Defendant.

NO. 84-2-01919-8

R. A. HANSON COMPANY, INC.,
and RAHCO, INC.,
Plaintiffs,

vs.

STATE OF WASHINGTON,
DEPARTMENT OF REVENUE,
Defendant.

NO. 84-2-01894-9

C-18

REYNOLDS METALS CORPORATION,
Plaintiff,

vs.

STATE OF WASHINGTON,
DEPARTMENT OF REVENUE,
Defendant.

NO. 85-2-00867-4

SCOTT PAPER COMPANY,
Plaintiff,

vs.

STATE OF WASHINGTON,
DEPARTMENT OF REVENUE,

Defendant.

NO. 85-2-00879-8

SQUARE D COMPANY,
Plaintiff,

vs.

STATE OF WASHINGTON,
DEPARTMENT OF REVENUE,

Defendant.

NO. 85-2-00868-2

C-19

E. R. SQUIBB & SONS, INC. et al.,
Plaintiffs,

vs.

STATE OF WASHINGTON,
DEPARTMENT OF REVENUE,
Defendant.

NO. 85-2-00869-1

TRIDENT SEAFOODS CORPORATION,
Plaintiff,

vs.

STATE OF WASHINGTON,
DEPARTMENT OF REVENUE,
Defendant.

NO. 84-2-01929-5

U. S. OIL & REFINING CO.,
Plaintiff,

vs.

STATE OF WASHINGTON,
DEPARTMENT OF REVENUE,
Defendant.

NO. 84-2-01927-9

C-20

W. R. GRACE & CO.,
Plaintiff,

vs.

STATE OF WASHINGTON,
DEPARTMENT OF REVENUE,
Defendant.

NO. 85-2-00920-4

WELCH FOODS INC., A COOPERATIVE,
Plaintiff,

vs.

STATE OF WASHINGTON,
DEPARTMENT OF REVENUE,
Defendant.

NO. 84-2-01932-5

WESTERN STEEL CASTING COMPANY,
Plaintiff,

vs.

STATE OF WASHINGTON,
DEPARTMENT OF REVENUE,
Defendant.

NO. 84-2-01896-5

WESTINGHOUSE ELECTRIC CORPORATION,
Plaintiff,

vs.

STATE OF WASHINGTON,
DEPARTMENT OF REVENUE,
Defendant.
NO. 84-2-01899-0

The plaintiffs to the above referenced actions, by their attorneys, BOGLE & GATES and John T. Piper, and the defendant to the above referenced actions, by its attorneys, KENNETH O. EIKENBERRY, Attorney General, and William B. Collins, Assistant Attorney General, hereby stipulate as follows:

1. All of the above referenced actions shall be consolidated, pursuant to CR 42(a), under Cause No. 84-2-01900-7.

2. All pleadings for the consolidated cases filed subsequent to the Order of Consolidation made pursuant to this Stipulation shall be filed under Cause No. 84-2-01900-7 except as provided in paragraphs 3 and 4 herein.

3. A copy of this Stipulation And Order For Consolidation shall be filed in each of the above referenced actions being consolidated.

4. A copy of the Summary Judgment entered in Cause No. 84-2-01900-7 shall be filed in each of the above referenced actions being consolidated.

DATED this 19th day of July, 1985.

KENNETH O. EIKENBERRY
Attorney General
State of Washington
/s/ William B. Collins
William B. Collins
Assistant Attorney General
Attorney for Defendant

BOGLE & GATES
/s/ John T. Piper
John T. Piper
Attorney for Plantiffs

ORDER OF CONSOLIDATION

Based on the foregoing Stipulation it is hereby ORDERED, ADJUDGED AND DECREED as follows:

1. All of the above referenced actions shall be consolidated, pursuant to CR 42(a), under Cause No. 84-2-01900-7.

2. All pleadings for the consolidated cases filed subsequent to this Order of Consolidation shall be filed under Cause No. 84-2-01900-7 except as provided in paragraphs 3 and 4 herein.

3. A copy of this Stipulation And Order For Consolidation shall be filed in each of the above referenced actions being consolidated.

4. A copy of the Summary Judgment entered in Cause No. 84-2-01900-7 shall be filed in each of the above referenced actions being consolidated.

DATED this 19th day of July, 1985.

/s/ Orris L. Hamilton
ORRIS L. HAMILTON, Judge Pro Tem

KENNETH O. EIKENBERRY
Attorney General
State of Washington

/s/ William B. Collins
William B. Collins
Assistant Attorney General
Attorney for Defendant

BOGLE & GATES

/s/ John T. Piper
John T. Piper
Attorney for Plaintiffs

Appendix D

NOTICE OF APPEAL

[Filed May 22, 1986]

IN THE SUPREME COURT OF
THE STATE OF WASHINGTON

NATIONAL CAN CORPORATION *et al.*,
Appellants,

v.

STATE OF WASHINGTON,
DEPARTMENT OF REVENUE,
Respondent.

No. 51910-2

NOTICE OF APPEAL

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that National Can Corporation, Advanced Technology Laboratories, Inc.; A.H. Robins Company, Incorporated; Alaskan Copper Companies, Inc.; Alaska Pacific Seafoods, Inc.; Allis-Chalmers Corporation; Alpac Corporation; American Cyanamid Company; AMF Head Sportswear, Inc.; AMF, Incorporated; AMF Voit, Inc.; Armstrong World Industries, Inc.; ASC Pacific, Inc.; Basic American Foods, Inc. aka AMPCO Foods, Inc.; Ben Hogan Company; Bethlehem Steel Corporation; Charles of the Ritz Group, Ltd. and its operating subsidiaries; Chrysler Corporation; Clark Equipment Company; Cominco American, Incorporated; Cominco Electronic Materials, Incorporated; Cummins Engine Company, Inc.; Data I/O Corporation; Edward Weck and Company, Inc.; E.R. Squibb & Sons, Inc.; Fentron Building Products Co., a dividion of Criton Technologies; The Firestone Tire and Rubber Co.; Ford Motor Company; Foseco, Inc.; General Brewing

Company; General Electric Company; G. Heilman Brewing Company, Inc.; Heath Techna Aerospace Co., a division of Criton Technologies; Honeywell Inc.; International Paper Company; Jacqueline Cochran, Inc.; Kalama Chemical, Inc.; Kal Kan Foods, Inc.; Kenai Salmon Packing Company; Korry Electronics Co., a division of Criton Technologies; Lone Star Industries, Inc.; Longview Fibre Company; Mars, Inc.; E.M. Matson, Jr., Co.; Mattel, Inc.; Miller Brewing Company; Murray Pacific Corporation; National Can Corporation; Noel Canning Corporation; North Pacific Processors, Inc.; Peter Pan Seafoods, Inc.; Olympia Brewing Company; Pabst Brewing Company; Paragon Electric Co., Inc.; Quinton Instrument Company; R.A. Hanson Company, Inc.; RAHCO, Inc.; Rainier Brewing Co.; Reynolds Metals Corporation; Scott Paper Company; Shulton, Inc.; Spacelabs, Inc.; Square D Company; Thomasville Furniture Industries, Inc.; Trident Seafoods Corporation; Uncle Ben's, Inc.; U.S. Oil & Refining Co.; Welch Foods, Inc., a cooperative; Western Steel Casting Company; Westinghouse Electric Corporation; W.R. Grace & Co.; Xerox Corporation; appellants herein, hereby appeal to the Supreme Court of the United States from the final order of the Supreme Court of the State of Washington, entered herein on March 6, 1986, affirming the Superior Court of Thurston County's Summary Judgment entered July 19, 1985.

This appeal is taken pursuant to 28 U.S.C. §1257(2).

DATED this 22nd day of May, 1986.

Bogle & Gates

/s/ D. Michael Young
D. Michael Young

/s/ Franklin G. Dinces
Franklin G. Dinces

AFFIDAVIT OF SERVICE

STATE OF WASHINGTON
COUNTY OF KING

I hereby affirm and certify that service of the foregoing Notice of Appeal to the Supreme Court of the United States was made on the only party required to be served, by mailing true copies thereof to Respondent's attorneys, Kenneth O. Eikenberry, Attorney General, addressed to him at his office, Temple of Justice, Olympia, Washington 98504; and William B. Collins, Assistant Attorney General, addressed to him at his office, 415 General Administration Building, AX-02, Olympia, WA 98504, in the regular United States mail, postage prepaid, this 22nd day of May, 1986.

/s/ D. Michael Young
D. Michael Young
Attorney for Appellant

SUBSCRIBED AND SWORN TO before me this 22nd day of May, 1986.

/s/ Devon C. McDonald
Notary Public for the State of Washington residing at Bellevue.

Appendix E

Constitutional and Statutory Provisions

United States Constitution, Article I, Section 8, Clause 3 ("the Commerce Clause"):

> The Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.

Revised Code of Washington (1983):

> §82.02.030 Additional tax rates.
> (1) The rate of the additional taxes under RCW 82.04.2901 . . . shall be seven percent;
> . . . .

> §82.04.220 Business and occupation tax imposed.
> There is levied and shall be collected from every person a tax for the act or privilege of engaging in business activities. Such tax shall be measured by the application of rates against value of products, gross proceeds of sales, or gross income of the business, as the case may be.

> §82.04.230 Tax upon extractors.
> Upon every person engaging within this state in business as an extractor; as to such persons the amount of the tax with respect to such business shall be equal to the value of the products, including byproducts, extracted for sale or for commercial or industrial use, multiplied by the rate of forty-four one-hundredths of one percent.

The measure of the tax is the value of the products, including byproducts, so extracted, regardless of the place of sale or the fact that deliveries may be made to points outside the state.

§82.04.240 Tax on manufacturers.

Upon every person except persons taxable under subsections (2), (3), (4), (5), (7), (8), or (9) of RCW 82.04.260 engaging within this state in business as a manufacturer; as to such persons the amount of the tax with respect to such business shall be equal to the value of the products, including byproducts, manufactured, multiplied by the rate of forty-four one-hundredths of one percent.

The measure of the tax is the value of the products, including byproducts, so manufactured regardless of the place of sale or the fact that deliveries may be made to points outside the state.

§82.04.250 Tax on retailers.

Upon every person except persons taxable under RCW 82.04.260(8) engaging within this state in the business of making sales at retail, as to such persons, the amount of tax with respect to such business shall be equal to the gross proceeds of sales of the business, multiplied by the rate of forty-four one-hundredths of one percent. . . .

§82.04.260 Tax on buyer and wholesaler of wheat, oats, dry peas, dry beans, lentils, triticale, corn, rye, and barley—Flour and oil manufacturers—Seafood products manufacturers—Fruit and vegetable processors—Research and development organizations—Perishable meat products processors and wholesalers—Nuclear fuel assemblies—Travel agents—Certain international activities—Stevedoring and

associated activities — Low-level waste disposers — Insurance agents, brokers, and solicitors.

(1) Upon every person engaging within this state in the business of buying wheat, oats, dry peas, dry beans, lentils, triticale, corn, rye and barley, but not including any manufactured or processed products thereof, and selling the same at wholesale; the tax imposed shall be equal to the gross proceeds derived from such sales multiplied by the rate of one one-hundredth of one percent.

(2) Upon every person engaging within this state in the business of manufacturing wheat into flour, soybeans into soybean oil, or sunflower seeds into sunflower oil; as to such persons the amount of tax with respect to such business shall be equal to the value of the flour or oil manufactured, multiplied by the rate of one-eighth of one percent.

(3) Upon every person engaging within this state in the business of splitting or processing dried peas; as to such persons the amount of tax with respect to such business shall be equal to the value of the peas split or processed, multiplied by the rate of one-quarter of one percent.

(4) Upon every person engaging within this state in the business of manufacturing seafood products which remain in a raw, raw frozen, or raw salted state at the completion of the manufacturing by that person; as to such persons the amount of tax with respect to such business shall be equal to the value of the products manufactured, multiplied by the rate of one-eighth of one percent.

(5) Upon every person engaging within this state in the business of manufacturing by canning, preserving, freezing or dehydrating fresh fruits and vegetables; as to such persons the amount of tax with respect to such business shall be equal to the value of the products canned, preserved, frozen or dehydrated multiplied by the rate of three-tenths of one percent.

. . . .

(7) Upon every person engaging within this state in the business of slaughtering, breaking and/or processing perishable meat products and/or selling the same at wholesale only and not at retail; as to such persons the tax imposed shall be equal to the gross proceeds derived from such sales multiplied by the rate of thirty-three one-hundredths of one percent.

. . . .

§ 82.04.270 Tax on wholesalers, distributors.

(1) Upon every person except persons taxable under subsections (1) or (8) of RCW 82.04.260 engaging within this state in the business of making sales at wholesale; as to such persons the amount of tax with respect to such business shall be equal to the gross proceeds of sales of such business multiplied by the rate of forty-four one-hundredths of one percent.

(2) The tax imposed by this section is levied and shall be collected from every person engaged in the business of distributing in this state articles of tangible personal property, owned by them from their own warehouse or other central location in this state to two or more of their own retail stores or outlets, where no change of title or ownership occurs, the intent hereof being to impose a tax equal to the wholesaler's tax upon persons performing functions essentially comparable to those of a wholesaler, but not actually making sales: *Provided,* That the tax designated in this section may not be assessed twice to the same person for the same article. The amount of the tax as to such persons shall be computed by multiplying forty-four one-hundredths of one percent of the value of the article so distributed as of the time of such distribution: *Provided,* That persons engaged in the activities described in this subsection shall not be liable for the tax imposed if by proper invoice it can be shown that they have purchased such property from a wholesaler who has paid a business and occupation tax to the state upon the same articles. This proviso shall not apply to purchases from

manufacturers as defined in RCW 82.04.110. The department of revenue shall prescribe uniform and equitable rules for the purpose of ascertaining such value, which value shall correspond as nearly as possible to the gross proceeds from sales at wholesale in this state of similar articles of like quality and character, and in similar quantities by other taxpayers: *Provided further,* That delivery trucks or vans will not under the purposes of this section be considered to be retail stores or outlets.

§ 82.04.290 Tax on other business or service activities.

Upon every person engaging within this state in any business activity other than or in addition to those enumerated in RCW 82.04.230, 82.04.240, 82.04.250, 82.04.255, 82.04.260, 82.04.270, and 82.04.280; as to such persons the amount of tax on account of such activities shall be equal to the gross income of the business multiplied by the rate of 1.50 percent: *Provided,* That this tax shall be imposed only if all of the amendments contained in sections 1, 3, and 4 of this 1983 act become law. This section includes, among others, and without limiting the scope hereof (whether or not title to materials used in the performance of such business passes to another by accession, confusion or other than by outright sale), persons engaged in the business of rendering any type of service which does not constitute a "sale at retail" or a "sale at wholesale." The value of advertising, demonstration, and promotional supplies and materials furnished to an agent by his principal or supplier to be used for informational, educational and promotional purposes shall not be considered a part of the agent's remuneration or commission and shall not be subject to taxation under this section.

§ 82.04.2901 Additional tax imposed.

There is levied and shall be collected from every person, other than persons taxed under RCW 82.04.2904, for the act or privilege of engaging in business activities, as a part of the tax imposed by the provisions of RCW 82.04.250, an additional tax equal to the rate specified in RCW 82.02.030 multiplied by the tax payable under the provisions of RCW 82.04.250: *Provided,* That as to such persons making sales at retail in border counties other than retail sales of telephone services, as defined in RCW 82.04.065, such additional tax shall be levied and collected from such persons with respect to such sales in border counties in an amount equal to thirty-two percent multiplied by the tax payable under the provisions of RCW 82.04.250: *Provided further,* That the additional tax under this section shall be imposed only if all of the amendments contained in sections 1 through 3 of this 1983 act become law.

To facilitate collection of this additional tax, the department of revenue is authorized to adjust the basic rates of persons to which this section applies in such manner as to reflect the amount to the nearest one-thousandth of one percent of the additional tax hereby imposed, adjusting ten-thousandths equal to or greater than five ten-thousandths to the greater thousandth.

§ 82.04.2904 Additional tax imposed.

(1) There is levied and shall be collected from every person for the act or privilege of engaging in business activities, as a part of the tax imposed under RCW 82.04.220 through 82.04.240, inclusive, and RCW 82.04.260 through 82.04.280, inclusive, an additional tax equal to ten percent multiplied by the tax payable under RCW 82.04.220 through 82.04.240, inclusive, and RCW 82.04.260 through 82.04.280, inclusive: *Provided,* That this additional tax shall be imposed only if all

of the amendments contained in sections 1, 2, and 4 of this 1983 act become law.

(2) There is also levied and shall be collected from every person for the act or privilege of engaging in the business activity of making sales at retail which are exempt from the tax imposed under chapter 82.08 RCW by reason of RCW 82.08.0261, 82.08.0262, or 82.08.0263, as a part of the tax imposed under RCW 82.04.250, an additional tax equal to ten percent multiplied by the tax payable on those activities under RCW 82.04.250: *Provided,* That this additional tax shall be imposed only if all of the amendments contained in sections 1, 2, and 4 of this 1983 act become law.

(3) To facilitate collection of these additional taxes, the department of revenue is authorized to adjust the basic rates of persons to which this section applies in such manner as to reflect the amount to the nearest one-thousandth of one percent of the additional tax hereby imposed, adjusting ten-thousandths equal to or greater than five ten-thousandths to the greater thousandth.

§ 82.04.4295 Deductions—Manufacturing activities completed outside the United States.

In computing tax there may be deducted from the measure of tax by persons subject to payment of the tax on manufacturers pursuant to RCW 82.04.240, the value of articles to the extent of manufacturing activities completed outside the United States, if:

(1) Any additional processing of such articles in this state consists of minor final assembly only; and

(2) In the case of domestic manufacture of such articles, can be and normally is done at the place of initial manufacture; and

(3) The total cost of the minor final assembly does not exceed two percent of the value of the articles; and

(4) The articles are sold and shipped outside the state.

§82.04.440 Persons taxable on multiple activities.

Every person engaged in activities which are within the purview of the provisions of two or more of section RCW 82.04.230 to 82.04.290, inclusive, shall be taxable under each paragraph applicable to the activities engaged in: *Provided,* That persons taxable under RCW 82.04.250 or 82.04.270 shall not be taxable under RCW 82.04.230, 82.04.240 or subsection (2), (3), (4), (5), or (7) of RCW 82.04.260 with respect to extracting or manufacturing of the products so sold, and that persons taxable under RCW 82.04.240 or RCW 82.04.260 subsection (4) shall not be taxable under RCW 82.04.230 with respect to extracting the ingredients of the products so manufactured.

§82.04.450 Value of products, how determined.

(1) The value of products, including byproducts, extracted or manufactured shall be determined by the gross proceeds derived from the sale thereof whether such sale is at wholesale or at retail, to which shall be added all subsidies and bonuses received from the purchaser or from any other person with respect to the extraction, manufacture, or sale of such products or byproducts by the seller, except:

(a) Where such products, including byproducts, are extracted or manufactured for commercial or industrial use;

(b) Where such products, including byproducts, are shipped, transported or transferred out of the state, or to another person, without prior sale or are sold under circumstances such that the gross proceeds from the sale are not indicative of the true value of the subject matter of the sale.

(2) In the above cases the value shall correspond as nearly as possible to the gross proceeds from sales in this state of similar products of like quality and character, and in similar quantities by other taxpayers, plus the amount of subsidies or bonuses ordinarily payable by the purchaser or by any third person with respect to the extraction, manufacture, or sale of

such products: *Provided,* That the value of a product manufactured or produced for purposes of serving as a prototype for the development of a new or improved product shall correspond: (a) To the retail selling price of such new or improved product when first offered for sale; or (b) to the value of materials incorporated into the prototype in cases in which the new or improved product is not offered for sale. The department of revenue shall prescribe uniform and equitable rules for the purpose of ascertaining such values.

§ 82.04.460 Business within and without state — Apportionment.

(1) Any person rendering services taxable under RCW 82.04.290 and maintaining places of business both within and without this state which contribute to the rendition of such services shall, for the purpose of computing tax liability under RCW 82.04.290, apportion to this state that portion of his gross income which is derived from services rendered within this state. Where such apportionment cannot be accurately made by separate accounting methods, the taxpayer shall apportion to this state that proportion of his total income which the cost of doing business within the state bears to the total cost of doing business both within and without the state.

(2) Notwithstanding the provision of subsection (1) of this section, persons doing business both within and without the state who receive gross income from service charges, as defined in RCW 63.14.010(8) (relating to amounts charged for granting the right or privilege to make deferred or installment payments) or who receive gross income from engaging in business as financial institutions within the scope of chapter 82.14A RCW (relating to city taxes on financial institutions) shall apportion or allocate gross income taxable under RCW 82.04.290 to this state pursuant to rules promulgated by the department consistent with uniform rules for apportionment or allocation developed by the states.

(3) The department shall by rule provide a method or methods of apportioning or allocating gross income derived from sales of telephone services taxed under this chapter, if the gross proceeds of sales subject to tax under this chapter do not fairly represent the extent of the taxpayer's income attributable to this state. The rules shall be, so far as feasible, consistent with the methods of apportionment contained in this section and shall require the consideration of those facts, circumstances, and apportionment factors as will result in an equitable and constitutionally permissible division of the services.

§ 82.04.500 Tax part of operating overhead.

It is not the intention of this chapter that the taxes herein levied upon persons engaging in business be construed as taxes upon the purchasers or customers, but that such taxes shall be levied upon, and collectible from, the person engaging in the business activities herein designated and that such taxes shall consititute a part of the operating overhead of such persons.

Appendix F

PARTIES TO THE PROCEEDING

APPELLANTS:

Advanced Technology Laboratories, Inc.
A.H. Robins Company, Incorporated
Alaskan Copper Companies, Inc.
Alaska Pacific Seafoods, Inc.
Allis-Chalmers Corporation
Alpac Corporation
American Cyanamid Company
AMF Head Sportswear, Inc.
AMF, Incorporated
AMF Voit, Inc.
Armstrong World Industries, Inc.
ASC Pacific, Inc.
Basic American Foods, Inc. aka AMPCO Foods, Inc.
Ben Hogan Company
Bethlehem Steel Corporation
Charles of the Ritz Group, Ltd. and its operating subsidiaries
Chrysler Corporation
Clark Equipment Company
Cominco American, Incorporated
Cominco Electronic Materials, Incorporated
Cummins Engine Company, Inc.
Data I/O Corporation
Edward Weck and Company, Inc.
E.R. Squibb & Sons, Inc.
Fentron Building Products Co., a division of Criton Technologies
The Firestone Tire and Rubber Co.
Ford Motor Company
Foseco, Inc.
General Brewing Company
General Electric Company
G. Heileman Brewing Company, Inc.
Heath Techna Aerospace Co., a division of Criton Technologies

Honeywell Inc.
International Paper Company
Jacqueline Cochran, Inc.
Kalama Chemical, Inc.
Kal Kan Foods, Inc.
Kenai Salmon Packing Company
Korry Electronics Co., a division of Criton Technologies
Lone Star Industries, Inc.
Longview Fibre Company
Mars, Inc.
E.M. Matson, Jr., Co. (a sole proprietorship)
Mattel, Inc.
Miller Brewing Company
Murray Pacific Corporation
National Can Corporation
Noel Canning Corporation
North Pacific Processors, Inc.
Peter Pan Seafoods, Inc.
Olympia Brewing Company
Pabst Brewing Company
Paragon Electric Co., Inc.
Quinton Instrument Company
R.A. Hanson Company, Inc.
RAHCO, Inc.
Rainier Brewing Co.
Reynolds Metals Company
Scott Paper Company
Shulton, Inc.
Spacelabs, Inc.
Square D Company
Thomasville Furniture Industries, Inc.
Trident Seafoods Corporation
Uncle Ben's, Inc.
U.S. Oil & Refining Co.
Welch Foods, Inc., a cooperative
Western Steel Casting Company
Westinghouse Electric Corporation
W.R. Grace & Co.

Xerox Corporation

APPELLEE:

State Of Washington, Department of Revenue

Appendix G

Designation of Corporate Relationships

Appellants state that this is its original Designation of Corporate Relationships, listing appellants' parents, subsidiaries and affiliates, except for wholly-owned subsidiaries.

APPELLANT:	Advanced Technology Laboratories, Inc.
PARENT:	Squibb Corporation
SUBSIDIARY:	International Biomedics, Inc.
AFFILIATES:	Bach Mueller Company California Public Screening Inc. Charles of the Ritz S.A. Manufactureros Quimicos Farmaceuticos S.A. Ohmaco S.A. Sino American Shanghai Standard Pharmaceuticals Ltd. Squibb Nova Ltd. Squibb Connaught Squibb Industria Quimica, S.A. Squibb Pakistan Ltd. Squibb (Nigeria) Ltd. Squibb of Bangladesh Ltd. Symbotics Ltd. Von Heyden Gesellschaft Mit Beschrankter Haftung
APPELLANT:	A.H. Robins Company, Incorporated

PARENTS:	Stock of A.H. Robins Company, Inc. is publicly traded on the New York Stock Exchange. Corporations owning 5% or more of Appellant are: Central Fidelity Bank Republic Bank Corporation
SUBSIDIARY:	Lee Laboratories, Inc.
AFFILIATES:	Eurand Italia S.p.A. Eurand International S.r.L. Eurand Microencapsulation, S.A. Pharia Industrial Company A.H. Robins Farmaceutica, S.A. Parfums Caron, S.A. Plastique et Parfum, S.A. A.H. Robins Showa Co., Ltd.
APPELLANT:	Alaskan Copper Companies, Inc.
PARENT:	None
SUBSIDIARY:	Leschi Boat Service
AFFILIATES:	None

APPELLANT:	Alaska Pacific Seafoods, Inc.
PARENTS:	North Pacific Processors, Inc. owned by Marubeni Corporation, a Japanese corporation (Marubeni-Japan)
SUBSIDIARIES:	None
AFFILIATE:	Kenai Salmon Packing Co.
APPELLANT:	Allis-Chalmers Corporation
PARENTS:	Allis-Chalmers Corporation stock is traded on the New York Stock Exchange. No corporate shareholder owns 5% or more of Appellant's stock.
SUBSIDIARIES:	Orissa Sponge Iron Limited AC Furesa Andina S.A. AC Iberia, S.A. AFNE - Allis S.A.
AFFILIATES:	Svenska Fluidcarbon AB AAF Heat Recovery Limited

APPELLANT:	Alpac Corporation
PARENT:	Skinner Corporation

Alpac Corporation has no subsidiaries or affiliates.

APPELLANT:	American Cyanamid Company
PARENTS:	American Cyanamid Company stock is publicly traded on the New York Stock Exchange. No corporation owns 5% or more of Appellant's stock.
SUBSIDIARIES:	Cyanamid Iberia, S.A. Cyanamid India, Ltd. Cyanamid Italia S.p.A. Cyanamid Fothergill Ltd. CYRO Industries B. Braun-Dexon G.m.b.H. Cyanamid Taiwan Corp. TDF Tiofine B.V. Mitsui-Cyanamid Ltd. Lederle (Japan) Ltd. Societe Des Sutures Chirurgicales Robert & Carriere-Lederle
AFFILIATES:	None
APPELLANT:	AMF Head Sportswear, Inc.
PARENTS:	Minstar, Inc. The following are the only corporations owning 5% or more, or beneficial interests in groups

owning 5% or more, of Minstar, Inc.:

Jacobs Industries, Inc.
MNR Holdings, Inc.
Leucadia National Corporation
LNC Investments, Inc.
Charter National Life Insurance Company
American Investment Company
Leucadia, Inc.
Uintah National Corporation
TLC Associates
The Bellfonte Company
Pentad, Inc.

SUBSIDIARIES: None

AFFILIATES: Pioneer Corp.
Enron Corporation
Tidewater, Inc.

APPELLANT: AMF, Incorporated

PARENTS: Minstar, Inc. The following are the only corporations owning 5% or more, or beneficial interests in groups owning 5% or more, of Minstar, Inc.:

Jacobs Industries, Inc.
MNR Holdings, Inc.
Leucadia National Corporation
LNC Investments, Inc.

Charter National Life Insurance Company
American Investment Company
Leucadia, Inc.
Uintah National Corporation
TLC Associates
The Bellfonte Company
Pentad, Inc.

SUBSIDIARIES: None

AFFILIATES: Pioneer Corp.
Enron Corporation
Tidewater, Inc.

APPELLANT: AMF Voit, Inc.

PARENTS: Minstar, Inc. The following are the only corporations owning 5% or more, or beneficial interests in groups owning 5% or more, of Minstar, Inc.:

Jacob Industries, Inc.
MNR Holdings, Inc.
Leucadia National Corporation
LNC Investments, Inc.
Charter National Life Insurance Company
American Investment Company
Leucadia, Inc.
Uintah National Corporation
TLC Associates
The Bellfonte Company
Pentad, Inc.

SUBSIDIARIES: None

AFFILIATES:	Pioneer Corp. Enron Corporation Tidewater, Inc.
APPELLANT:	Armstrong World Industries, Inc.
PARENTS:	Armstrong World Industries, Inc. stock is traded on the New York, Philadelphia, and Pacific Stock Exchanges. No corporation owns 5% or more of Appellant.
SUBSIDIARIES:	Armstrong Cork Espana, S.A. Armstrong World Industries Pty. Ltd.
AFFILIATES:	Inarco Limited Armstrong Cork (Ireland) Limited Armstrong World Industries, G.m.b.H.
APPELLANT:	ASC Pacific, Inc.
PARENTS:	BHP Holdings (USA) Inc. (Wholly owned by Broken Hill Proprietary Company, Ltd., an Australian corporation.)
SUBSIDIARIES:	None
AFFILIATES:	Mineracao Wares Utah Carriers

Marcona Conveyor Corporation
Waipipi Iron Sands
BHP Minerals
Hunter Valley Aluminum
COCE
IDM
Rheem
Pt. Rheem Indonesia
Rheem NZ
Amalgamated Superannuation Fund
Rydalmere Nominees
Lypaght (Taiwan)
John Lysaght (Malaysia)
John Lysaght (PNG)
RMI Holdings
John Lysaght (South Pacific)
Societe Industrielle
Clinton International Corporation

APPELLANT: Basic American Foods, Inc. aka AMPCO Foods, Inc.

Basic American Foods, Inc. is a privately held corporation. No corporation owns 5% or more of Appellant's stock, and Appellant has no subsidiaries or affiliates.

APPELLANT: Ben Hogan Company

PARENTS: Minstar, Inc. The following are the only corporations owning 5% or more, or beneficial interests in groups owning 5% or more, of Minstar, Inc.:

Jacobs Industries, Inc.
MNR Holdings, Inc.
Leucadia National Corporation
LNC Investments, Inc.
Charter National Life Insurance Company
American Investment Company
Leucadia, Inc.
Uintah National Corporation
TLC Associates
The Bellfonte Company
Pentad, Inc.

SUBSIDIARIES: None

AFFILIATES: Pioneer Corp.
Enron Corporation
Tidewater, Inc.

APPELLANT: Bethlehem Steel Corporation

PARENTS: Bethlehem Steel Corporation stock is publicly traded on the New York Stock Exchange. The only corporation owning 5% or more of Appellant is United Banks of Colorado, Inc.

SUBSIDIARIES: Consep Membranes, Inc.
Iron Ore Land Company
Presque Isle Corporation
Seadrill, Inc.
Southeast, Incorporated
Nubeth Joint Venture

AFFILIATES:	Bethlehem Singapore Private Limited
	Erie Mining Company, A Limited Partnership
	Empreendimentos Brasileiros de Mineracao S.A. - E.B.M.
	Mineracoes Brasileiras Revnidas - MBR
	G&A Limited Partnership III-A
	Griffin-Alexander International, Inc.
	Iron Ore Company of Canada
	Northern Land Company, Limited
	La Compagnie de Telephone Ungava
	Schefferville Power Company
	Twin Falls Power Corporation Limited
	Labrador Telephone Co.
	Met-Mex Penoles. S.A. de C.V.
	Minera Apolo, S.A. de C.V.
	Restauradora de las Minas de Catorce, S.A. de C.V.
	Thailand Offshore Joint Venture
	Walbridge Coatings, an Illinois Partnership
	Rig V Limited Partnership
	Nordex Joint Venture
	Rig VI Limited Partnership
	Hibbing Taconite Company
	Ontario Iron Company
APPELLANT:	Charles of the Ritz, Ltd. and its operating subsidiaries

PARENT:	Squibb Corporation
SUBSIDIARY:	Charles of the Ritz S.A.
AFFILIATES:	Bach Mueller Company California Public Screening Inc. International Biomedics, Inc. Manufactureros Quimicos Farmaceuticos S.A. Ohmaco S.A. Sino American Shanghai Standard Pharmaceuticals Ltd. Squibb Nova Ltd. Squibb Connaught Squibb Industria Quimica, S.A. Squibb Pakistan Ltd. Squibb (Nigeria) Ltd. Squibb of Bangladesh Ltd. Symbotics Ltd. Von Heyden Gesellschaft Mit Beschrankter Haftung
APPELLANT:	Chrysler Corporation
PARENTS:	No corporate shareholder owns 5% or more of Appellant's stock. Chrysler Corporation stock is traded on the New York Stock Exchange.

The subsidiaries of Chrysler Corporation (other than dealer corporations) are:

Diamond Star Motors Corporation
Mitsubishi Motors Corporation
Peugeot, S.A.
Officine Alfieri Maserati, S.p.A.

Chrysler Corporation has no affiliates.

APPELLANT:	Clark Equipment Company
PARENTS:	Clark Equipment Company stock is publicly traded on the New York Stock Exchange. The only entities owning 5% or more of Appellant are:
	Clark Equipment Company Leveraged Employee Stock Ownership Plan
	United Banks of Colorado, Inc.
	United Bank of Denver
	Dean LeBaron Trustee for Batterymach Financial Management
SUBSIDIARIES:	None
AFFILIATES:	VME Group, N.V.
	Transmisiones y Equipos Mecanicos S.A. de C.V.
APPELLANT:	Cominco American, Incorporated

PARENT: Cominco Holdings N.V.

Cominco American, Incorporated has no subsidiaries or affiliates.

APPELLANT: Cominco Electronic Materials, Incorporated

PARENTS: Cominco American, Incorporated
Cominco Holdings N.V.

Cominco Electronic Materials, Incorporated has no subsidiaries or affiliates.

APPELLANT: Cummins Engine Company, Inc.

PARENTS: Cummins Engine Company stock is traded on the New York Stock Exchange.

SUBSIDIARIES: CADEC Systems, Inc.
Consolidated Diesel Company
Cummins Nordeste, S.A.
Cummins Southwest, Inc.
Dampers Iberica S.A.
Dina Cummins, S.A.
Energy Technologies, Inc.
Hyperbar USA, INC.
Kirloskar-Cummins Limited
Onan Corporation
Adept Technologies, Inc.

AFFILIATES: None

APPELLANT: Data I/O Corporation

PARENTS: Data I/O Corporation's stock is publicly traded over the counter in the National Market System. The only entities owning 5% or more of Appellant's stock are:

Weiss, Pec & Greer
The Independent Investment Company, Ltd.

Appellant has no subsidiaries or affiliates.

APPELLANT: Edward Weck and Company, Inc.

PARENT: Squibb Corporation

SUBSIDIARY: Bach Mueller Company

AFFILIATES:
California Public Screening Inc.
Charles of the Ritz S.A.
International Biomedics, Inc.
Manufactureros Quimicos Farmaceuticos S.A.
Ohmaco S.A.
Sino American Shanghai Standard Pharmaceuticals Ltd.
Squibb Nova Ltd.
Squibb Connaught
Squibb Industria Quimica, S.A.
Squibb Pakistan Ltd.
Squibb (Nigeria) Ltd.
Squibb of Bangladesh Ltd.
Symbotics Ltd.

	Von Heyden Gesellschaft Mit Beschrankter Haftung
APPELLANT:	E.R. Squibb & Sons, Inc.
PARENT:	Squibb Corporation
SUBSIDIARIES:	None
AFFILIATES:	Bach Mueller Company California Public Screening Inc. International Biomedics, Inc. Manufactureros Quimicos Farmaceuticos S.A. Ohmaco S.A. Sino American Shanghai Standard Pharmaceuticals Ltd. Squibb Nova Ltd. Squibb Connaught Squibb Industria Quimica, S.A. Squibb Pakistan Ltd. Squibb (Nigeria) Ltd. Squibb of Bangladesh Ltd. Symbotics Ltd. Von Heyden Gesellschaft Mit Beschrankter Haftung
APPELLANT:	Fentron Building Products Co., a division of Criton Technologies
PARENTS:	Criton Technologies, a New York partnership Criton Corporation Royal Zenith Inc. Dyson Kissner Moran

B.S.D. Diversified
The Bowery Savings Bank

Appellant has no subsidiaries or affiliates.

APPELLANT: The Firestone Tire & Rubber Company

PARENTS: Stock of The Firestone Tire & Rubber Company is publicly traded on the New York, Midwest & Pacific Stock Exchanges. Corporations owning 5% or more of the Appellant are:

Banc One Corporation
Dean LeBaron d/b/a Batterymach Financial Management
United Banks of Colorado, Inc.

The subsidiaries of The Firestone Tire & Rubber Company other than Firestone stores are:

Industria Firestone de Costa Rica, S.A.
Firestone Italia S.p.A.
Liberian Metal Processing, Inc.
Firestone N.Z., Limited
Firestone Portuguesa S.A.R.L.
Firestone El Centenario, S.A.
Firestone Tire & Rubber Company of the Philippines
Firestone South Africa Limited

Firestone Hispania, S.A.
Siam Company Limited
Adela Investment Company

AFFILIATES:

Companhia Brasileira de Borracha CBB
Vulcopneu
Centre Auto Aubagne La Martelle S.A.R.L.
Sentrachem Limited
Hopewell International Insurance Ltd.
United Insurance Company
Lone Star Transport Lines, Inc.
Liberian Bank For Development & Investment

APPELLANT: Ford Motor Company

PARENTS: Ford Motor Company stock is publicly traded on the New York Stock Exchange. No corporate shareholder owns 5% or more of Appellant's stock.

SUBSIDIARIES: The subsidiaries of Ford Motor Company (other than wholly owned subsidiaries or corporations in which all the stock not held by Ford Motor Company is held by dealer-operators of Ford products) are:

Ford Motor Company of Canada, Limited

Ford Brasil, S.A.
Ford-Werke, A.G.
Ford Motor Company (Belgium) N.V.
Ford Motor Company A/S
O/Y Ford A/B
Ford Motor Company Aktiebolag
Ford Nederland B.V.
Eleveth Taconite Company
Ford Lio Ho Motor Company Ltd.
Renaissance Partnership
Starnet Corporation
Fairlane Woods Association (A Partnership)

AFFILIATES: None

APPELLANT: Foseco, Inc.

PARENTS: Foseco Minsep, Inc. (Owned by Foseco Minsep PLC which is traded in Great Britain.)

SUBSIDIARIES: None

AFFILIATES: Greaves Foseco Ltd.
Unicorn Industries PLC
HH Wardle (Metals) Ltd.
Foseco SAE
Foseco Japan
Fosven C.A.
Fosroc Tremco Pty Ltd.
Nonporite (NSW) Pty Ltd.
Nonporite (QLD) Pty Ltd.
Nonporite (WA) Pty Ltd.
Nonporite (SA) Pty Ltd.
Foseco S.A.
Promedo-Sifraco SNC
Craelius G.m.b.H.
Fosbel Inc.

Foseco Espanola S.A.
Foseco S.A. de C.V.
Foseco Hellas S.A.
Fosam Ltd.
Giesserei Dinest G.m.b.H.
Fosroc Construction Chemicals Private Shareholding Co. Ltd.
Foseco Argentina S.A.
Exotermicos Monclava S.A.
Foseco Industrial E Commercial Ltda.
Fosbel Brasil
Foseco Minsep UAE Private Ltd.
The Golden Gate Metallurgical Development Co.
Celtite Inc.
Foseco Korea Ltd.
Foseco Iran SSK
Fosbel Japan Ltd.
Fosbel Europe B.V.
Foseco Portugal Produtos Para Fundicao Lda.
Foseco Minsep Inc.
Van Mannekus Universal
Forbeton Rhone Alps S.A.R.L.
Forbeton Acquitaine S.A.R.L.
Indimant Industridiamanten G.m.b.H. Toyoda Van Moppes KK

APPELLANT: General Brewing Company

PARENTS: S&P Company (aka Keller Street Development Co.)

SUBSIDIARIES: None

AFFILIATES: Pabst Brewing Company
Falstaff Brewing Corporation

APPELLANT: General Electric Company

PARENTS: General Electric Company stock is publicly traded on the New York Stock Exchange. No corporation owns 5% or more of Appellant.

SUBSIDIARIES:
Reuter-Stokes Canada Limited
Electromat S.A.
Iran Electrical and Mechanical Services Co.
SADELMI-COGEPI Compagnia Generale Progettazioni e Installazioni S.p.A.
Societa Nazionale della Officine de Savigliano S.p.A.
General Electric de Mexico, S.A. de C.V.
Joint Venture with Industrias Unidas, S.A.
American General Electric (Nigeria) Ltd.
Construcciones Industriales de Maquinaria e Ingenieria, S.A.

Sadelmi-Nigeria Ltd.
General Electric Electromedicina, S.A.
Sociedad Iberica de Contrucciones Electricas
General Electrik Turk Anonim Sirketi
Sadelmi Limited
Adobe Canyon Corporation
Springer Mining Company
Osram Argentina Sociedad Anonima Commercial e Industrial
The China Car and Foundry Company Limited (In Liquidation)
CFM International, S.A.
Fabrications Mecaniques de l'Atlantique S.A.
SNEF Electro Mecanique (S.E.M.)
Elpro International Limited
IGE (India) Limited
Turbomotori Internazionale S.p.A.
C&C International, Ltd.
Drive System Company, Ltd.
Engineering Plastics, Ltd.
Eye Lighting Systems Corporation
GEM Polymers Ltd.
General Electric (U.S.A.) Industrial Automation, Ltd.
Information Services International - Dentsu, Ltd.
Japan Nuclear Fuel Company, Limited

Toshiba Electronic Systems Co. Ltd.
Toshiba Silicone Company, Ltd.
Yokogawa Medical Systems, Ltd.
Samsung Medical Systems
Brelec, S.A. de C.V.
Diesel Industrial y Tractiva S.A. de C.V.
Generacion Electrica Nacional S.A. de C.V.
Medidores Electromecanicos, S.A. de C.V.
Ultrapol, S.A. de C.V.
Donald Brown & Co. Ltd.
IGE of Nigeria Ltd.
Sadelmi Nigeria Limited
A/S. Medirad
Philippine Electric Corporation
Jamjoom Electrical Distribution Assemblies Company Ltd.
Svenska Medirad A.B.
Taian Electrical Manufacturing Company
United Asia Electric Company
CBI Nuclear Company
CFM International, Inc.
Cool Water Coal Gasification Program
Coherent General, Inc.
High Voltage Breakers, Inc.
Hydraulic Turbines, Inc.
Industrial Networking, Inc.
Locke Insulators, Inc.
Otisca Industries, Limited

Ringwood Avenue Joint Venture Assoc.
General Electric de Uruguay S.A.
Venezolana de Compresores y Motores S.A.
Asahi Diamond Industrial Company, Limited
Shinano Tokki, K.K.
Toshiba Corporation
General Electric (Kenya) Ltd.
Marquette Electronics, Inc.
Solomon Design Automation Systems
Star Technologies, Inc.
Vicom Systems, Inc.

AFFILIATES:

General Electric - Goninan Limited
General Electric-Ricard Limited
Sade Sul Americana de Engenharia S.A.
CAMCO, Inc.
Canadian General Electric Company Limited
Constructors-Sadelmi International Ltd.
Condisa S.A. Ingenieros Contratistas
Sud Americana de Electrificacion S.A.
W.Q.S. France S.A.R.L.
Quarzglas G.m.b.H.
Westdeutsche Quarzschmelze G.m.b.H.
Intersil India Limited
Intersil Singapore (Pte.) Limited

Watt & Akkermans Pte. Ltd.
Sociedad Anonima de Ingerieros Contratistas
Bates Turner, Inc.
Sud Americana de Electrificacion S.A.
Bunbury Rewinds Pty. Ltd.
F. R. Tulk & Co. Pty. Limited (In liquidation)
Goldfields Rewinds Pty. Limited
Niart International, Inc.
Valmet-Dominion, Inc.
Consorcio Distral-SADE Ltda. (In liquidation)
EASY, S.A. de C.V.
Enseres Electrodomesticos, S.A. de C.V.
Enseres Electroindustriales, SS. de C.V.
ISLO, S.A. de C.V.
POWER ELECTRICA, S.A. de C.V.
TRAGESA, S.A. de C.V.
Kvaerner-Calma A/S
Philippine Appliance Corporation
Philippine Glass Bulbs, Inc.
Pinagkaisa Realty Corporation
Philacor Realty and Development Corporation
Saudi American General Electric Company Limited
TUSAS Motor Sanayii A.S.
Reinsurance Systems Limited
A.P. - GERECCO Ltd.
Airport Tech Center Associates

American Oil and Gas Corporation
Amwest Associates
Arvada-Fremont Developers
Atrium V Joint Venture
BMW Credit Corporation
Baconsfield Associates
Bayou Cogeneration Plant
Bayou Partners Limited
Brandemere Associates
Cardinal Cogen
Center Stage I Associates
CFC/GECC (New York) Associates I
CFC/GECC (New York) Associates II
Diamond Oaks Associates
Ebbert's Homes VI
Ebbert's Homes VII
Equipment Financing Associates
Executive Center West Associates
FGIC Corporation
Financo Investors Fund L.P.
Financo Investors Management Partnership L.P.
Gleneagle Associates
Guinness Peat Aviatim
Huntington Glen Associates
Kirby Fletcher Stamford, Ltd.
Kramer Capital Corporation
Lonestar Florida Holding, Inc.
Marquette Center Associates I
Millicent Way Associates
Mira Mesa R&D Associates
Northchase One Associates

Northchase Two Associates
Northern Oaks Associates
Northern Telecom/General Electric Credit Associates
Ozona Development Drilling Partnership I
Ozona Development Drilling Partnership II
Ozona Development Drilling Partnership III
Park Place Developers, Ltd.
Pathfinder Mines Corporation
Patrick Petroleum Corporation Drilling Program No. 1
Patrick Petroleum Corporation South Louisiana Five Well Investment Package
Pear Tree Joint Venture
Pellicano Business Center Associates
Pierremont Phase II Associates
Plum Tree Dallas Associates, Ltd.
Powers Pointe Associates
Regency Park
Renner Plaza Associates
Racom Corporation
Rolling Hills Ranch
Structural Dynamics Research Corporation
SGE (New York) Associates I
SGE (New York) Associates II
Summit Oakes Associates
Timberglen Associates
VHD Electronics, Inc.
Vandenberg Country Club

Wainoco Appalachian Stamford, Ltd.
Watkins Equity Leasing
Wiles Associates
Woodlands Corporate Ctr. II
Manufacturera de Aparatos Domesticos S.A.
Turbinas y Mecanica C.A.
Vidriolux, C.A.
SADE Sociedad Anonima Constructora, Commercial, Industrial, Financiera, Inmobiliaria y de Mandatos
Jones and Rickard (Pty.) Limited
Banco Brasileiro de Investimentos Ipiranga S.A. (In liquidation)
UMON-Engenharia de Montagem Ltda.
Canadian Nuclear Equipment Suppliers Limited
TUSAS Aerospace Sanayii A.S.
Industrias Electronicas S.A.
Sociedad Financiera Credival C.A.
APA Ventures II Limited
Anadigics, Inc.
Analogic Corporation
Applied ImmuneSciences, Inc.
Applied Information Memories
Applied Materials, Inc.
Arlington Cable Partners
Avanti Communications Corp.
Axiom Computers, Inc.
Biological Energy Corp.
Brooke & Mack, Inc.

CGX Corp.
Cadre Technologies, Inc.
Canaan Computer Corp.
Commterm, Inc.
Computer Aided Design Group, Inc.
Computer Thought Corp.
Corporate Traffic Management, Inc.
Crop Genetics International N.V.
Crosspoint Venture Partners II
EnMasse Computer Corp.
Fairfield Venture Capital Fund L.P.
Galileo Electro-Optics Corp.
Gigabit Logic, Inc.
Health Stop Medical Management, Inc.
Hercules Limited Partnership Interest
Hercules Offshore Drilling Co.
I-Scan Corp
Ibis Systems, Inc.
Kleiner, Perkins, Caufield & Byers II
Kleiner, Perkins, Caufield & Byers II Annex
Koala Technologies Corp.
Kurta Corp.
Laserpath Corp.
Masstor Systems Corp.
Medical and Scientific Designs, Inc.
Megatape Corp.
Mobile Satellite Communications Corp.

Morris Decision Systems, Inc.
Multiflow Computer, Inc.
Nellcor, Inc.
Netra Corp.
Octel Communications Corp.
Omni-Flow, Inc.
Perceptron, Inc.
Prime Capital L.P.
Raster Technologies, Inc.
Saber Technology Corp.
Scientific Computer Systems, Inc.
SEEQ Technologies, Inc.
Silicon Compilers, Inc.
Stratus Computer, Inc.
Sydis, Inc.
Symbolics, Inc.
TeleSoft, Inc.
UTI Instruments Co.
Vitalink Communications Corp.
Ztel, Inc.
Burndy Corp.
Hughes Tool Co.
Cedar Creek Associates

APPELLANT: G. Heileman Brewing Company, Inc.

PARENTS: G. Heileman Brewing Company, Inc. stock is publicly traded on the New York Stock Exchange. The only entity owning 5% or more of Appellant is Batterymach Financial Management.

G. Heileman Brewing Company, Inc. has no subsidiaries or affiliates.

APPELLANT: Heath Techna Aerospace Co., a division of Criton Technologies

PARENTS:
Criton Technologies, a New York partnership
Criton Corporation
Royal Zenith Inc.
Dyson Kissner Moran
B.S.D. Diversified
The Bowery Savings Bank

Heath Techna Aerospace Co. has no subsidiaries or affiliates.

APPELLANT: Honeywell Inc.

PARENTS: Honeywell Inc. stock is publicly traded on the New York Stock Exchange. No corporation owns 5% or more of Appellant.

SUBSIDIARIES:
Votan
Honeywell - Ericsson Development Company
Honeywell - Sharecom Houston
Honeywell AG
Honeywell Turki - Arabia LTD.
Goldstar - Honeywell Company, LTD.
NEC Honeywell Space Systems
Honeywell B.V.

AFFILIATES:
Magnetic Peripherals Inc.
Societe De Promotion Commerciale Bull S.A.R.L.

Peripheral Components Inc.
Optical Peripherals Lab
Data Management S.p.A.
RSO Futura S.r.l.
Societa Iniziative Commerciali Industriali Techniche S.p.A. Sicit
Sviluppo Informatica Sistemi Aziendali S.p.A. Sisa
Societa Italiana Servizi Technici Ed Organizzativi S.p.A. Sisto
Hong Leong Honeywell Sdn. Bhd.
Honeywell Sistemas Informacion, S.A. DE C.V.
Mexicanna Industrial Honeywell, S.A. DE C.V.
IPC-ISSC-Automation G.m.b.H. and Co., KG
Compagnie CII-HB Internationale N.V.
Honeywell Bull, S.A. (Belgium)
ABC-BULL Telemacatic S.A.
CII Honeywell Bull Systems N.V.
Honeywell Bull A.G.
Sociedade Portuguesa Honeywell Bull, LDA.
Honeywell Bull, S.A. (Spain)
Datasystem, S.A.
Honeywell Do Brasil & Cia.
Saudi Arabian Tetra Tech Limited
CDA - Weeks, A joint venture
Pyromeca S.A.

Cometa S.A.
Honeywell ET Compagnie
Honeywell Europe S.A.
Holding K.G.
Honeywell India Limited
Yamatake - Honeywell Co.,
LTD.
Taishin Co., LTD.
Yamatake Engineering Service
Co., Ltd.
IPC Espana, S.A.
Yamatake and Co., Ltd.
Honevwell Kuwait K.S.C.
Dienes - Honeywell G.m.b.H.
FEG Gesellschaft Fur Logistik
Arbeitsmedizinische
Betreuungsgesellschaft
Kieler Betriebe G.m.b.H.
Centra - Buerkle G.m.b.H.
Bull S.A.
CII Honeywell Bull Congo
OY Honeywell Bull AB
Bull CP8
CII Honeywell Bull Afrique,
S.A.
CII Honeywell Bull
Cameroun S.A.R.L.
CII Honeywell Bull Gabon
S.A.R.L.
CII Honeywell Bull Cote
D'Ivoire S.A.
CII Honeywell Bull Niger
S.A.R.L.
CII Honeywell Bull Senegal
S.A.R.L.
Compagnie Francaise D'In-
vestissments Prives
(COFIP)

Societe Internationale Pour L'Innovation
CII Honeywell Bull Systemes
Bull Peripherals G.m.b.H.
Honeywell Bull S.A.L.
Honeywell Bull, Madagascar
Honeywell Bull Maroc S.A.
Micro Card Technologies Inc.

APPELLANT: International Paper Company

PARENTS: International Paper Company stock is publicly traded on the New York Stock Exchange. No corporation owns 5% or more of Appellant.

SUBSIDIARIES: Arizona Chemcial Company
International Paper Capital Formation, Inc.
Societe Mediterraneenne, D' Emballages
Corporacion Forestal De Venezuela, C.A.
Envases Internacional, S.A.
Forest Insurance Limited
International Paper Korea Ltd.
IPI Corporation
Paper Industries Corporation of the Philippines
Productora De Papeces, S.A.
Rouviere Company
Sicilcartone, S.r.L.

AFFILIATES: None

APPELLANT: Jacqueline Cochran, Inc.

PARENTS: American Cyanamid Company

Jacqueline Cochran, Inc. has no subsidiaries or affiliates.

APPELLANT: Kalama Chemical, Inc.

PARENTS: Kalama Chemical,Inc. is a privately held corporation. The only corporations owning any stock in Kalama are:

The Dow Chemical Company, Norwest Growth Fund, Inc., and Shriner's Hospital.

Other than their passive ownership interests, none of these corporations are affiliated with Kalama.

SUBSIDIARIES: Kalama Foreign Sales Corporation
Kalama International, Ltd.

AFFILIATES: Seville Trading Co. Ltd.
Kalama International, a joint venture

APPELLANT: Kal Kan Foods, Inc.

PARENT: Mars, Incorporated

Kal Kan Foods, Inc. has no subsidiaries or affiliates.

APPELLANT: Kenai Salmon Packing Co.

PARENT:	North Pacific Processors, Inc. owned by Marubeni Corporation, a Japanese corporation (Marubeni-Japan)
SUBSIDIARIES:	None
AFFILIATES:	Alaska Pacific Seafoods
APPELLANT:	Korry Electronics Co., a division of Criton Technologies
PARENTS:	Criton Technologies, a New York partnership Criton Corporation Royal Zenith Inc. Dyson Kissner Moran B.S.D. Diversified The Bowery Savings Bank

Criton Technologies has no subsidiaries or affiliates.

APPELLANT:	Lone Star Industries, Inc.
PARENTS:	Lone Star Industries, Inc. stock is traded on the New York Stock Exchange.
SUBSIDIARIES:	Arm-Star Venture Associates Compania Nacional de Cemento Portland Dixon-Marquette Cement, Inc. General Hydrocarbons Polymer Concrete Inc. Lone Star - Falcon Lone Star-KC Concrete Tie Company

Lone Star Prestress Concrete, Inc.
Northwest Aggregates Co.
Pacific Coast Cement Corporation
Polycon Research, Inc.
Polymer Concrete Research, Inc.
Pyrament N.V.
Quazite Corporation

AFFILIATES:

Angaston Holdings Ltd.
Campania de Cimento Salvador S.A.
Canteras de Riachuelo S.A.
Cemento San Martin S.A.
Hawaiian Cement
Hawaii Pier 32 Holding Corporation
Lonestar Florida Cement, Inc.
Lonestar Florida Holding, Inc.
Lone Star Hawaii, Inc.
Lone Star Hawaii Cement Corporation
Lone Star Hawaii Rock Products, Inc.
Lone Star Hawaii Services, Inc.
Plastibeton Canada Inc.
Plastibeton Inc.
Riachuelo S.A.
Stresscon, partnership
San-Vel Santa Fe J/V
CACP Cementus S.A.
Lone Star Hawaii Construction, Inc.
Lone Star Hawaii Properties, Inc.
Cimento Maua S.A.

Marcomin Participacoes Ltda.
Qualimat Distribuidoes de Materiais de Construcao S.A.
Minsisiso Campeao Ltda.
Campeao Participacoes Ltda.
Maporte Transportadoes Ltda.
Cimentos Aluminosos Cialmig - Lafarge Ltda.

APPELLANT: Longview Fibre Company

Longview Fibre Company is a privately held corporation. No corporation owns 5% or more of Appellant's stock and Appellant has no subsidiaries or affiliates.

APPELLANT: Mars, Inc.

Mars, Inc. is a privately held corporation, and Appellant has no subsidiaries or affiliates.

APPELLANT: E. M. Matson, Jr., Co.

E. M. Matson, Jr., Co. is a sole proprietorship. Appellant has no subsidiaries or affiliates.

APPELLANT: Mattel, Inc.

PARENTS: Stock of Mattel, Inc. is publicly traded on the New York Stock Exchange. Corporations owning 5% or more of Appellant are:

Warburg, Pincus Capital Partners, L.P.

E.M. Warburg Pincus & Co., Inc.
RJR, Ltd.
WDR, Ltd.
Camont Investments, Inc.

SUBSIDIARIES: Mattel Limited (Taiwan)
Mattel Molds, Ltd. (Taiwan)

AFFILIATES: None

APPELLANT: Miller Brewing Company

PARENTS: Philip Morris Companies, Inc.
Philip Morris Inc.

Miller Brewing Company has no subsidiaries or affiliates.

APPELLANT: Murray Pacific Corporation

PARENTS: Murray Pacific Corporation is a privately held corporation. No corporation owns 5% or more of Appellant and Appellant has no subsidiaries or affiliates.

APPELLANT: National Can Corporation

PARENTS: Triangle Industries, Inc.

SUBSIDIARIES: None

AFFILIATES: Central Jersey Industries
Avery, Inc.
Nippon National Seikon Co.
National Can Italiana, S.p.A.
Nacanco SUD S.p.A.
National Can Iberica, S.A.

APPELLANT:	The Noel Corporation d/b/a Noel Canning Corporation
PARENTS:	Noel Canning Corporation is a privately held corporation. No corporation owns 5% or more of Appellant's stock, and Appellant has no subsidiaries or affiliates.
APPELLANT:	North Pacific Processors, Inc.
PARENT:	Marubeni Corporation, a Japanese corporation (Marubeni-Japan)
SUBSIDIARIES:	Alaska Pacific Seafoods, Inc. Kenai Salmon Packing Co.
AFFILIATES:	None
APPELLANT:	Peter Pan Seafoods, Inc.
PARENT:	Nichiro Gyogyo Kaisha, Ltd.
SUBSIDIARIES:	Peninsula Salmon, Inc. Peter Pan Communications, Inc. SeaBlends Food Company, Inc. Seven Seas Fishing Company, Inc. Astoria Warehousing, Inc.
AFFILIATES:	Nichiro Pacific, Ltd.
APPELLANT:	Olympia Brewing Company

PARENTS:	Pabst Brewing Company is successor in interest as of 12/31/83. Pabst is owned by S&P Company.
SUBSIDIARIES:	None
AFFILIATES:	Falstaff Corporation General Brewing Company
APPELLANT:	Pabst Brewing Company
PARENT:	S&P Company (aka Keller Street Development Co.)
SUBSIDIARIES:	None
AFFILIATES:	Falstaff Corporation General Brewing Company
APPELLANT:	Paragon Electric Co., Inc.
PARENTS:	Paragon Electric Co., Inc. is a privately held corporation. No corporation owns 5% or more of Appellant. Paragon has no subsidiaries or affiliates.
APPELLANT:	Quinton Instrument Company
PARENT:	A.H. Robins Company, Incorporated
SUBSIDIARIES:	None
AFFILIATES:	Lee Laboratories, Inc. Eurand Italia A.P.A. Eurand International S.r.L. Eurand Microencapsulation, S.A.

Pharia Industrial Company
A.H. Robins Farmaceutica, S.A.
Parfums Caron, S.A.
Plastique et Parfume, S.A.
A.H. Robins Showa Co., Ltd.

APPELLANT: R.A. Hanson Company, Inc.

R.A. Hanson Company, Inc. is a privately held corporation. No corporation owns 5% or more of Appellant. R.A. Hanson Company has no subsidiaries or affiliates.

APPELLANT: RAHCO, Inc.

PARENT: R.A. Hanson Company, Inc.

RAHCO, Inc. has no subsidiaries or affiliates.

APPELLANT: Rainier Brewing Co.

PARENT: G. Heileman Brewing Company, Inc.

Rainier Brewing Co. has no subsidiaries or affiliates. Appellant merged into parent 12/31/83.

APPELLANT: Reynolds Metals Company

PARENTS: Reynolds Metals Company stock is publicly traded on the New York Stock Exchange. The only corporations owning 5% or more of Appellant are:

Templeton, Galbreath & Hamburger, Ltd.

Windsor Fund Series/
Windsor Fund
Wellington Management
Co./Thorndyke, Doran,
Pain & Lewis

SUBSIDIARIES:

Alpart Farms (Jamaica), Ltd.
Alpart Jamaica, Inc.
Alternwerder Hutten-Und
Walzwerk G.m.b.H.
Eskimo Pie Corporation
Halco (Mining), Inc.
Robertshaw Controls
Company
Volta Aluminium Company
Limited

AFFILIATES:

Aluminio Del Caroni, S.A.
Aluminio Reynolds Del Peru
Sociedad Anonima
Aluminio Reynolds, S.A.
Aluminio Reynolds, Santo
Domingo, S.A.
Aluminium-Oxid-
Gemeinschaft Stade
Aluminium Oxid Stade
G.m.b.H.
Aluminum Corporation of
the Philippines
Bevco Containers
Bushnell Plaza Development
Corporation
City Venture Corporation
Compania Metallurgica
Colombiana, S.A.
Compagnie Des Bauxites De
Guinee
Egyptian Aluminium Products
Company

Eskimo Europ, S.a.r.l.
Hamburger Aluminium-Werk G.m.b.H.
Industria Navarra Del Aluminio, S.A.
Industrias Lacteas Del Yocomia, S.A.
Industrias Metal Mecanicas Del Quindio, S.A.
Iranian Aluminum Co.
Jamaica Alumina Security Company, Ltd.
Lynx-Canada Explorations Limited
Manicouagan Power Company
Minas Do Dragao Ltda.
Mineraco Rio Do Norte S.A.
Mineraco Sao Jorge Ltda.
Mineradora De Bauxita Ltda.
Minerais De Aluminio Ltda.
New Eastwick Corporation
Phillips-C.B.A. Conductors Limited
Presidential Development Corporation
Presidential Plaza Corporation
Puerto De Hierro, Sociedad Anonima
Reynolds Aluminio, Sociedad Anonima
Reynolds Aluminum Company of Canada, Ltd.
Reynolds Philippine Corporation
Reywest Development Corporation
S.L.I.M. - Societa Lavorazioni Industriali Metalli S.p.A.

Superenvases Envalic, C.A.
Umco, S.A.
Union Industrial y Astilleros Barranquilla "Unial" S.A.
Valesul Aluminio S.A.
Weybosset Hill Development Corporation
Worsley Alumina Pty., Ltd.
Alternative Housing Associates
Alumina Partners of Jamaica
Aluminium-Oxid-Gemeinschaft Stade
Bennett Manor Associates
Bevco Containers
Burrstone Associates
Capitol Hill Associates, Ltd.
Cathedral Square Associates
Cathedral Square Associates, II
Chasco Woods Associates, Ltd.
Curtis Apartments Associates
Cypress Courts Associates, Ltd.
Cypress Cove Associates, Ltd.
Drew Gardens Associates, Ltd.
Jamaica Reynolds Bauxite Partners
Jefferson Village Associates
Midtown Associates
Mill Pond Towers Associates
The National Housing Partnership
Oceanside Estates Associates, Ltd.
One Empire Plaza Associates

Rayburn Manor Associates
Regency West Associates
Reynolds Gilbane Realty Associates
Reynolds Metals Company & Associate, L.P.
Reywest Development Company
Southeast Vinyl Company
Titusville Manor Associates
Windermere Associates, Ltd.
Eastwick Joint Venture
Eastwick Joint Venture I
Eastwick Joint Venture IV
Mount Gibson Joint Venture
Regency Joint Venture
The Reynolds-Gilbane-Weybosset Joint Venture
Worsley Joint Venture

APPELLANT: Scott Paper Company

PARENTS: None

SUBSIDIARIES: None

AFFILIATES:
Gureola - Scott, S.A.
Taiwan Scott Paper Corporation
Celulosa Jujuy, S.A.
The Bowater - Scott Corporation of Australia, Ltd.
Companhia de Papisis
Scott Paper Limited
Papeles Scott de Columbia, S.A.
Scott Paper Company de Costa Rica

Sanyo Scott Company, Limited
Ssangyong Paper Co., Ltd.
Compania Industrial de Son Cristobal
Scott Trading Limited
Thai-Scott Paper Company Limited
Bowater-Scott Corporation Limited
Brunswick Pulp & Paper Company
Brunswick Pulp Land Company
Cansco Chemicals Limited
Mountain Tree Farm Company

APPELLANT: Shulton, Inc.

PARENTS: American Cyanamid Company

Shulton, Inc. has no subsidiaries or affiliates.

APPELLANT: Spacelabs, Inc.

PARENT: Squibb Corporation

SUBSIDIARIES: None

AFFILIATES: Bach Mueller Company
California Public Screening Inc.
Charles of the Ritz S.A.
International Biomedics, Inc.
Manufactureros Quimicos Farmaceuticos S.A.

	Ohmaco S.A. Sino American Shanghai Standard Pharmaceuticals Ltd. Squibb Nova Ltd. Squibb Connaught Squibb Industria Quimica, S.A. Squibb Pakistan Ltd. Squibb (Nigeria) Ltd. Squibb of Bangladesh Ltd. Symbotics Ltd. Von Heyden Gesellschaft Mit Beschrankter Haftung
APPELLANT:	Square D Company
PARENT:	Square D Company stock is publicly traded on the New York Stock Exchange. Only one entity owns more than 5% of Appellant: Delaware Management Company, Inc.
SUBSIDIARIES:	Palatine Hills Leasing, Inc. Square D Andina, S.A. Square D (Saudi Arabia) Limited
AFFILIATES:	Furukawa Circuit Foil Co., LTD Square D France, S.A. Square D Company Australia PTY, Limited Square D Italia S.p.A. Daito Topaz

APPELLANT:	Thomasville Furniture Industries, Inc.
PARENT:	Armstrong World Industries, Inc.
SUBSIDIARIES:	None
AFFILIATES:	Inarco Limited Armstrong Cork (Ireland) Limited Armstrong World Industries, G.m.b.H. Armstrong Cork Espana, S.A. Armstrong World Industries Pty. Ltd.
APPELLANT:	Trident Seafoods Corporation
PARENTS:	Trident Seafoods Corporation is a privately held corporation. No corporation owns 5% or more of Appellant.
SUBSIDIARY:	San Juan Seafoods, Inc.
AFFILIATE:	Windjammers, Inc.
APPELLANT:	Uncle Ben's, Inc.
PARENT:	Mars, Incorporated

Uncle Ben's, Inc. has no subsidiaries or affiliates.

APPELLANT:	U.S. Oil & Refining Co.
PARENT:	Time Oil Co.

SUBSIDIARY:	Diox Oil Inc.
AFFILIATES:	None
APPELLANT:	Welch Foods, Inc., a cooperative
PARENT:	National Grape Cooperative Association, Inc.
SUBSIDIARIES:	The Springfield Bank for Cooperatives Cooperating Brands, Inc.
AFFILIATES:	None
APPELLANT:	Western Steel Casting Company

Western Steel Casting Company is a privately held company. Appellant has no subsidiaries or affiliates.

APPELLANT:	Westinghouse Electric Corporation
PARENTS:	Westinghouse Electric Corporation stock is traded on the New York Stock Exchange. No corporation owns 5% or more of Appellant.
SUBSIDIARIES:	Electric Office Centers of America Innovative Technologies, Inc. KRW Energy Systems, Inc. Mictron, Inc. Powerex, Inc. Sentec Corporation

Siliconix, Inc.
Speech Plus
Theta J Corporation
Toshiba-Westinghouse Electronics Corporation
Turbine Metal Technologies, Inc.
United Western Technologies
VLSI Technology
WM Power Products, Inc.
Compagnie des Dispositifs Semiconducteurs Westinghouse
Eletromar Industria Eletrica Brasileira, S.A.
Enwesa Servicios S.A.
Tyree Industries Limited
Vektron, S.A.
Westinghouse Canada Inc.
Westinghouse, S.A.
WEXICO Systems and Services, Ltd.

AFFILIATES:

Boo Instrument AB
CDSW Ireland Limited
CEMAC Westinghouse PTY Limited
Condumex
Consu-IEM, S.A. de C.V.
Contradores Electricos, C.A.
Division Comercial IEM, S.A. de C.V.
Electro- Fanal S.A.
Eletromar Nordeste, S.A.
Electrotableros, S.A. de C.V.
E-Mail Westinghouse PTY Ltd.
Empresas IEM, S.A. de C.V.

APPELLANT:	W.R. Grace & Co.
PARENTS:	W.R. Grace & Co. stock is publicly traded on the New York Stock Exchange. No corporation owns 5% or more of Appellant.
SUBSIDIARIES:	AWI Business Data Services, Inc. Carbon Dioxide Slurry Systems L.P. CFF Beverage Company Del Taco Corporation Duke Transportation Inc. El Torito Restaurants, Inc. EMAbond Inc. E.T. Beverage Company, Inc. GHL Management, Inc. Grace Ventures Partnership One Herman's Sporting Goods, Inc. J.T. Beverage Inc. The L.C.S. Beverage Company, Inc. Monolith Enterprises, Incorporated Mountain View Insurance Company S&H Beverage Co., Inc. Soft Kat, Inc. Taco Villa, Inc. T&D Beverage, Inc. TAG Pharmaceuticals, Inc. Producta de Papeles S.A. Feldmuehle - Grace Noxeram G.m.b.H.

Darex Kabushiki Kaisha
Fuji - Davison Chemical Ltd.
Nippon Belt Kogyo K.K.
Teroson K.K.
Homco Trinidad Ltd.
Trinidad Nitrogen Co., Limited
Bartow Chemical Products

AFFILIATES:

Agracetus
Axial Basin Ranch Company
Beckett Partners
Bison Nitrogen Products Co.
Colowyo Coal Company
Four Corners Mine
Ft. Meade Chemical Products
Grace - Feldmuehle Motor Ceramics Company
Hayden Gulch West Coal Company
H-G Coal Company
Hughes Drilling Fluids
Marine Culture Enterprises
Oklahoma Nitrogen Co.
Paramont Coal Company
Pursue Gas Processing and Petrochemical Company
The Fono Ice Cream Company
Equipos IEM, S.A. de C.V.
Friem, S.A. de C.V.
Funktionelle Musik G.m.b.H.
Futu-IEM, S.A. de C.V.
Galileo La Rioja, S.A.
Galileo Uruguaya, S.A.
Hyundai Elevator
IEM S.A.
Industrias Electronicas, S.A.

Industria IEM, S.A. de C.V.
Industry Services Company of Saudi Arabia, Ltd.
Korea Industry Services Company, Ltd.
Maihak A.G. (H.)
Mex-Control, S.A. de C.V.
Mitsubishi Nuclear Fuel Co., Ltd.
Mitsubishi-Westinghouse Electric SGC, Ltd.
Reftrans, S.A.
Servicos Corporativos, IEM, S.C.
Silectra, S.A. de C.V.
Transformadores de Distribucion, S.A.
Transformadores TPL S.A.
Tyree-Power Construction Limited
Wescan Europe Ltd.
Westinghouse Asia Controls Corp.
Westinghouse Electric Supply Co. of Saudi Arabia
Westinghouse Electro Metalurgicas, C.A.
Westinghouse Projectos Electricos, S.A.
Westinghouse Saudi Arabia, Ltd.
Westralian Transformers PTY Limited
Avatar Technologies Control
Bridgeport Community Antenna TV Co.
Cable TV General, Inc.
CATV Enterprises, Inc.

American Health Capital
HIBI Management, Inc.
Cordell Chemicals, Inc.
El Paso Cablevision, Inc.
Focus Cable of Oakland, Inc.
Grosse Point Cable, Inc.
Group W Cable of Columbia
Heights/Hilltop, Inc.
Group W Cable of Lorain
County, Inc.
Group W Cable of North
Central Chicago, Inc.
Group W of Northwest
Chicago, Inc.
Group W Cable of St.
Bernard, Inc.
Horizon International
Television, Inc.
Integrated Communications
Systems
Kaiser-Teleprompter of
Hawaii, Inc.
New Trends, Inc.
Northern Tier Pipeline
O'Connor Combustor
Corporation
Perceptics
Piedmont Cablevision, Inc.
Porta Pak Corporation
Saw Mill River Cablevision,
Inc.
Sifco Turbine Component
Services
Southwest Video Corporation
Sutro Towers, Inc.
Telecom Cablevision, Inc.
Television Tower, Inc.
Valid Logic Systems, Inc.

APPELLANT:	Xerox Corporation
PARENTS:	Xerox Corporation stock is publicly traded on the New York Stock Exchange. No corporation owns 5% or more of Appellant.
SUBSIDIARIES:	Xerox Canada Inc. Xerox do Brasil S.A. Xerox del Peru, S.A. Xerox de Venezuela, C.A. Xerox de Colombia S.A. Rank Xerox Investments Limited Rank Xerox Limited Rank Xerox Holding B.V.
AFFILIATES:	Societe Industrielle Rank Xerox S.A. Fuji Xerox Co., Ltd. Rank Xerox (Australia) Pty. Limited Rank Xerox Greece S.A. International Marine Under—writers of New England, Inc. LWB Syndicate Inc. CALPAC Holding Company, Inc. Claremont Holdings Limited Commonwealth County Mutual Insurance Company Commonwealth Lloyd's Insurance Company Financial Guaranty Associates, Inc. Dimensional Corporate Finance, Inc.

Appendix H

[Filed May 1, 1985]

KALAMA CHEMICAL, INC.,
STIPULATION OF FACTS

IN THE SUPERIOR COURT OF
THE STATE OF WASHINGTON
FOR THURSTON COUNTY

KALAMA CHEMICAL, INC.,
Plaintiff,

v.

STATE OF WASHINGTON,
DEPARTMENT OF REVENUE,
Defendant.

NO. 84-2-01891-4

STIPULATION OF FACTS

The parties jointly stipulate that to the best of their knowledge and belief the following facts are true and correct:

1. Kalama Chemical, Inc. ("Kalama" or "the company"), is a Washington corporation, having its corporate office in Seattle, Washington.

2. Kalama manufactures and sells chemical products. Its products are sold primarily outside the State of Washington and in the export market.

3. Kalama operates manufacturing facilities in Kalama, Washington, and Garfield, New Jersey. Kalama maintains stocks of its goods (including those it manufactures in Washington) in Illinois, California, New Jersey, Indiana, New York, and Texas (as well as Washington). The original cost of Kalama's property in Washington is $23,762,321. The original cost of its property everywhere (including Washington) is $30,039,160. (Both costs are as of Kalama's fiscal year ended June 30, 1984, and include leased property, based on eight times the net annual rental rate.)

4. In order to sell Washington-manufactured products outside Washington, Kalama employs sales representatives and others whose activities outside Washington contribute to

the value of the products that are manufactured in Washington and sold outside this state. The cost of their activities is included in the price Kalama received for those products.

5. Kalama employs a total of approximately 175 people. Approximately 95 of them are employed in Washington and 80 are employed in other states. The company's Washington payroll was $3,297,524 for its fiscal year ended June 30, 1984. Its total payroll everywhere was $6,635,515 for the same period.

6. Kalama's employees in Washington include management/administrative personnel, plant workers, engineers, office personnel, and others whose activities in Washington contribute to the value of the products that are manufactured in this state. The cost of their activities is included in the price Kalama receives for those products.

7. As reported on its returns filed with the Washington State Department of Revenue for business and occupation tax purposes, Kalama's annual out-of-state sales of products manufactured in Washington ranged from $23,981,057 to $29,693,132 during the period January 1, 1980, through December 31, 1984. Kalama paid manufacturing business and occupation taxes to Washington of $495,612.59 (including interest) during that period.

8. Kalama's total sales everywhere were $46,779,613 during its fiscal year ended June 30, 1984. Its sales in Washington were $2,580,766 during the same period.

9. Kalama pays taxes to other jurisdictions on income derived in those locations from the sale of products manufactured in Washington. Kalama pays income tax to the states of California, New Jersey, and Illinois ("the Market States") on the income Kalama derives from the sale in those states of products manufactured in Washington. The income taxed by the Market States is Kalama's gross receipts (i.e., its gross income of every kind and from every source, including its gross proceeds from goods manufactured in Washington and sold in the Market States), minus certain deductions permitted by statute, and multiplied by an apportionment factor. The taxes

imposed by the Market States are apportioned on the basis of a three-factor formula that compares Kalama's property, payroll, and sales in those states to its property, payroll, and sales everywhere. For goods Kalama manufactures in Washington and sells in one of the Market States, Kalama's gross proceeds from those goods are attributed to the Market State and are, therefore, included in the numerator of its "sales" or "receipts" factor. Kalama's gross proceeds from the same goods are also used by Washington as the measure of its manufacturing tax on Kalama.

10. Kalama pays franchise tax to the State of Texas. The basis of the franchise tax is the corporation's "taxable capital" allocated to Texas. The "taxable capital" of a corporation is its stated capital (*e.g.*, the par value of all shares issued having a par value) and its surplus. The "taxable capital" of a corporation is allocated to Texas through an apportionment formula. Under the formula "taxable capital" is multiplied by a fraction, the numerator of which is the corporation's gross receipts from business done in Texas and the denominator of which is gross receipts from its entire business. Gross receipts includes the gross proceeds from sales delivered in Texas, services performed in Texas and other business done in Texas. For goods Kalama manufactures in Washington and sells in Texas, Kalama's gross proceeds from those goods are attributed to Texas and are, therefore, included in the numerator of Texas' apportionment formula as receipts from business done in Texas. Washington uses those same gross proceeds as the measure of its manufacturing tax on Kalama.

11. Kalama borrowed and invested funds during the years 1980 through 1984 in the generally available money markets. Kalama's experience with respect to the cost of borrowing money and its return on invested money reflected the prevailing market rates of interest.

12. No claims for refund are made by Kalama in this action on behalf of any corporation that is or has been a subsidiary or affiliate of Kalama. This stipulation is not a waiver of any such claims and is without prejudice to any right any

past or present Kalama subsidiary or affiliated corporation may have to seek such relief in a separate action.

KENNETH O. EIKENBERRY
Attorney General
State of Washington

/s/ William B. Collins
William B. Collins
Assistant Attorney General
Attorneys for Defendant

BOGLE & GATES

/s/ D. Michael Young
D. Michael Young
Attorneys for Plaintiff

Appendix 1

NATIONAL CAN CORPORATION STIPULATION OF FACTS

[Filed May 17, 1985]

IN THE SUPERIOR COURT OF
THE STATE OF WASHINGTON
FOR THURSTON COUNTY

NATIONAL CAN CORPORATION,
Plaintiff,
v.

STATE OF WASHINGTON
DEPARTMENT OF REVENUE,
Defendant.

NO. 84-2-01900-7

STIPULATION OF FACTS

The parties jointly stipulate that to the best of their knowledge and belief the following facts are true and correct:

1. National Can Corporation ("NCC") is a Delaware corporation, having its principal office in Chicago, Illinois.

2. NCC manufactures and sells packaging products. NCC's products are sold throughout the world.

3. NCC operates manufacturing facilities in 22 states, including Washington. NCC maintains offices in 25 states, including Washington. Exhibit A, which lists NCC's offices and facilities throughout the United States, is incorporated by reference as a part of this stipulation. The original cost of NCC's property in Washington was approximately $31.9 million. The original cost of its property everywhere (including Washington) was $899 million. (Both costs are as of 1983 and include leased property, based on eight times the net annual rental rate.)

4. In order to sell NCC packaging products in Washington and elsewhere, NCC maintains plants, offices, warehouses and other facilities in states other than Washington, and employs many people outside the State of Washington, including factory workers, engineers, scientists, laboratory technicians, accountants, lawyers, office personnel,

warehouse personnel, industrial and public relations personnel, computer programmers, data processors, and other employees whose activities outside Washington contribute to the value of the products that are sold in Washington. The cost of their activities is included in the price NCC receives for those products.

5. In order to sell its products outside Washington, (including the products it manufactures in Washington), NCC maintains offices, warehouses, and other facilities in states other than Washington, and employs many people outside the State of Washington, including sales representatives, engineers, scientists, laboratory technicians, accountants, lawyers, office personnel, warehouse personnel, industrial and public relations personnel, computer programmers, data processors, and other employees whose activities outside Washington contribute to the value of the products that are manufactured in Washington and sold outside this state. The cost of their activities is included in the price NCC receives for those products.

6. NCC employs approximately 10,400 people worldwide. Approximately 240 of NCC's employees are in Washington. In 1983, NCC's Washington payroll was approximately $7.6 million. Its total payroll everywhere was approximately $238 million.

7. In order to sell NCC packaging products in Washington, NCC maintains a sales office and employs 7 sales and office personnel in Washington whose activities contribute to the value of products sold in this state. The cost of their activities is included in the price NCC receives for those products.

8. In order to manufacture NCC products in Washington, NCC maintains two plants and employs factory workers, engineers, office personnel and others in Washington whose activities contribute to the value of the products that are manufactured in Washington and sold outside this state. The cost of their activities is included in the price NCC receives for those products.

9. As reported on returns filed with the Washington State Department of Revenue for business and occupation tax

purposes, NCC's annual Washington sales of products manufactured outside Washington ranged from $19.9 million to $32 million during the period January 1, 1980, through December 31, 1984. NCC paid wholesaling taxes to Washington of $606,863.26 on such sales during that period.

10. As reported on returns filed with the Washington State Department of Revenue for business and occupation tax purposes, NCC's annual out-of-state sales of products manufactured in Washington ranged from $11.3 million to $18.7 million during the period January 1, 1980, through December 31, 1984. NCC paid manufacturing taxes to Washington of $372,843.78 during that period.

11. As reported on returns filed with the Washington State Department of Revenue for business and occupation tax purposes, NCC's gross receipts from goods both manufactured and sold in Washington ranged from $71.4 million to $78.5 million during the period January 1, 1980, through December 31, 1984. NCC paid wholesaling taxes to Washington of approximately $1,800,000 on such gross receipts during that period.

12. Between January 1, 1980 and December 31, 1984, NCC paid approximately $2,800,000 in Washington State business and occupation taxes. In this action, NCC is seeking a refund of approximately $980,000 plus reasonable interest.

13. NCC's 1983 total sales everywhere were approximately $1.552 billion. Its 1983 sales in Washington were approximately $110 million.

14. NCC pays taxes to other jurisdictions on income derived in those locations from the sale of products manufactured in Washington. NCC pays taxes to the states of Arizona, California, Georgia, Illinois, Minnesota, Oregon and Wisconsin ("the Market States") on the income NCC derives from the sale in those statesof [sic] products manufactured in Washington. The income taxed by the Market States is NCC's gross receipts (i.e., its gross income of every kind and from every source, including its gross proceeds from goods manufactured in Washington and sold in the Market States), minus certain deductions permitted by statute, and multiplied by an apportionment factor. The state income taxes imposed

by the Market States are apportioned on the basis of a three-factor formula that compares NCC's property, payroll, and sales in those states to its property, payroll, and sales everwhere. [sic] For goods NCC manufactures in Washington and sells in one of the Market States, NCC's gross proceeds from those goods are attributed to the Market State and are, therefore, included in the numerator of its "sales" or "receipts" factor. NCC's gross proceeds from the same goods are also used by Washington as the measure of its manufacturing tax on NCC.

15. NCC pays taxes to other jurisdictions on income derived from its sales of products in Washington. NCC pays taxes to the State of California on the income NCC derives from manufacturing goods in California and selling them in Washington. NCC's gross proceeds from the same goods are also used by Washington as the measure of its wholesaling tax on NCC. The income taxed by California is NCC's gross receipts (i.e., its gross income of every kind and from every source, including its gross proceeds from goods manufactured in that state and sold in Washington), minus certain deductions permitted by statute, and multiplied by an apportionment factor. California's tax is apportioned on the basis of a three-factor formula that compares NCC's property, payroll, and sales in California to its property, payroll, and sales everywhere. For goods NCC manufactures in California and sells in Washington, the property and payroll of NCC's plants that produce those goods and of its offices in the manufacturing state are included in the numerator of that state's property and payroll factors, respectively.

16. Washington is the only state in which NCC is subjected to a gross receipts tax measured by 100% of the gross receipts from the sale of products manufactured in and sold outside the taxing state.

17. Between 1980 and 1984, NCC manufactured some articles in Washington for its own use. The total value of products so manufactured does not exceed $10,000. NCC paid manufacturing B&O tax to Washington on that activity, and such tax is not included in the amount of the refund sought in this action.

18. NCC borrowed and invested funds during the years 1980 through 1984 in the generally available money markets. NCC's cost of borrowing money and its return on invested money were interest in the range of ½% to 2½% over the prevailing prime lending rate.

19. No claims for refunds are made by NCC in this action on behalf of any corporation that is or has been a subsidiary of [sic] affiliate of NCC. This stipulation is not a waiver of any such claims and is without prejudice to any right any past or present NCC subsidiary or affiliated corporation may have to seek such relief in a separate action.

KENNETH O. EIKENBERRY
Attorney General
State of Washington

/s/ William B. Collins
William B. Collins
Assistant Attorney General
Attorneys for Defendant

BOGLE & GATES

/s/ D. Michael Young
D. Michael Young
Attorneys for Plaintiff

STIPULATION OF FACTS
EXHIBIT A

NATIONAL CAN CORPORATION
SUMMARY OF REAL PROPERTY LOCATIONS IN THE U.S.

REVISED 03/21/84

ST	ZIP	COUNTY	CITY	STREET ADDRESS	DIVISION	FACILITY
AL	38215	_____	BIRMINGHAM	124 CARBON ROAD, P.O. BOX 94067	MCD	PLANT
AZ	85031	_____	PHOENIX	211 N. 51ST AVENUE	MCD	PLANT
CA	94010	_____	BURLINGAME	P.O. BOX 1699, 1657 ROLLINS ROAD	MCD	PLANT
CA	94010	_____	BURLINGAME	1657 ROLLINS ROAD	MCD	SALES
CA	94010	_____	BURLINGAME	1657 ROLLINS ROAD	CEQS	OFFICE
CA	90701	_____	CERRITOS	11544 SOUTH STREET, P.O. BOX 8000	MCD	SALES
CA	91744	_____	CITY OF INDUSTRY	437 NORTH BALDWIN PARK BOULEVARD	CLOSURE	PLANT
CA	90023	_____	LOS ANGELES	2615 SOUTH BONNIE BEACH PLACE	MCD	PLANT
CA	90023	_____	LOS ANGELES	4212 EAST 26TH STREET	MCD	PLANT
CA	90040	_____	MAYWOOD	4855 EAST 52ND PLACE	GLASS	PLANT
CA	95351	_____	MODESTO	430 DOHERTY AVENUE	MCD	PLANT
CA	94577	_____	SAN LEANDRO	2050 WILLIAMS STREET	MCD	PLANT
CT	06810	_____	DANBURY	GREAT PASTURE ROAD	MCD	PLANT
CT	06801	_____	DANBURY	OLD RIDGEBURY ROAD, P.O. BOX 160	PLATICS	SALES
CT	06801	_____	DANBURY	OLD RIDGEBURY ROAD, P.O. BOX 160	PLATICS	PLANT
FL	32205	_____	JACKSONVILLE	3331 WEST 12TH STREET	MCD	PLANT
GA	30345	_____	ATLANTA	1760 CENTURY CIRCLE	MCD	SALES

IL	60638	_____	BEDFORD PARK	7300 SOUTH NARRAGANSETT AVENUE	CLOSURE	PLANT
IL	60638	_____	BEDFORD PARK	7420 SOUTH MEADE AVENUE	PLATICS	PLANT
IL	60651	_____	CHICAGO	1031 NORTH CICERO AVENUE	CLOSURE	PLANT
IL	60609	_____	CHICAGO	1101 WEST 43RD STREET	MCD	PLANT
IL	60638	_____	CHICAGO	5620 WEST 51ST STREET	MCD	PLANT
IL	60638	_____	CHICAGO	5620 WEST 51ST STREET	MCD	SALES
IL	60631	_____	CHICAGO	8101 WEST HIGGINS ROAD	EXECUTIVE	HDQ
IL	60631	_____	CHICAGO	8101 WEST HIGGINS ROAD	MCD	SALES
IL	60631	_____	CHICAGO	8101 WEST HIGGINS ROAD	PLATICS	HDQ
IL	60016	_____	DES PLAINES	1000 EAST NORTHWEST HIGHWAY	MCD	PLANT
IL	60016	_____	DES PLAINES	1000 EAST NORTHWEST HIGHWAY	CENG	OFFICE
IL	60007	_____	ELK GROVE VILLAGE	2500 LIVELY BOULEVARD	MCD	PLANT
IL	60007	_____	ELK GROVE VILLAGE	2520 LIVELY BOULEVARD	MCD	ART
IL	60143	_____	ITASCA	751 NORTH HILLTOP AVENUE	PLATICS	PLANT
IL	60143	_____	ITASCA	750 NORTH HILLTOP AVENUE	PLATICS	SALES
IL	61111	_____	LOVES PARK	5800 INDUSTRIAL AVENUE	MCD	PLANT
IL	60521	_____	OAKSBROOK	1211 WEST 22ND STREET	MCD	SALES
IL	60068	_____	PARK RIDGE	400 WEST HIGGINS ROAD	GLASS	SALES
IL	61109	_____	ROCKFORD	627 GRABLE STREET	CEQS	PLANT
IN	47705	_____	EVANSVILLE	2201 WEST HARVLAND STREET	CLOSURE	PLANT
IN	46404	_____	OARY	NORTH BRIDGE STREET	MCD	WAREHOUSE
IN	46350	_____	LA PORTE	300 NORTH FAIL ROAD	MCD	PLANT
IN	46952	_____	MARION	P.O. BOX 249	GLASS	PLANT
IN	46952	_____	MARION	P.O. BOX 249, EAST CHARLES STREET	EXECUTIVE	HDQ
IN	46390	_____	WANATAH	US HIGHWAY 30	MCD	PLANT
MA	01757	_____	MILFORD	P.O. BOX 398, NATIONAL AVENUE	GLASS	PLANT
MA	02162	_____	NEWTON LOWER FALLS	2345 WASHINGTON STREET	MCD	SALES
MA	02162	_____	NEWTON LOWER FALLS	2345 WASHINGTON STREET	GLASS	SALES

MD	21207	_____	BALTIMORE	7133 RUTHERFORD ROAD	MCD	SALES
MD	21230	_____	BALTIMORE	2147 WICOHICO	GLASS	WAREHOUSE
MD	21093	_____	BALTIMORE	10 BERARD AVENUE	GLASS	SALES
MD	21219	_____	SPARROWS POINT	2010 RESERVOIR ROAD	MCD	PLANT
MD	21219	_____	SPARROWS POINT	2010 RESERVOIR ROAD	CEQS	OFFICE
MI	48084	_____	TROY	3221 WEST BIG BEAVER ROAD	GLASS	SALES
MN	55107	_____	ST. PAUL	139 EVA STREET	MCD	PLANT
MN	55107	_____	ST. PAUL	139 EVA STREET	CEQS	OFFICE
MN	55113	_____	ST. PAUL	1805 W. COUNTY ROAD C	MCD	PLANT
MN	55114	_____	ST. PAUL	2085 ELLIS AVENUE	PLATICS	PLANT
MN	55110	_____	WHITE BEAR LAKE	3564 ROLLING VIEW DRIVE	MCD	SALES
MO	63105	_____	CLAYTON	135 NORTH MERAMEC AVENUE	GLASS	SALES
MO	63105	_____	CLAYTON	222 SOUTH MERAMEC AVENUE	MCD	SALES
MO	63105	_____	CLAYTON	222 SOUTH MERAMEC AVENUE	CEQS	OFFICE
MO	63070	_____	PEVELY	P.O. BOX 615, HWY 61 & 67	GLASS	PLANT
MO	63132	_____	ST. LOUIS	10777 BAUR BOULEVARD	PLATICS	PLANT
MS	39567	_____	PASCAGOULA	3202 DENNY AVENUE	MCD	PLANT
NC	28209	_____	CHARLOTTE	1515 MOCKINGBIRD LANE	GLASS	SALES
NC	27893	_____	WILSON	P.O. BOX 1757, 2200 FIRESTONE PRKWY	GLASS	PLANT
NJ	07066	_____	CLARK	67 WALNUT AVENUE	CLOSURE	PLANT
NJ	07066	_____	CLARK	67 WALNUT AVENUE	MCD	SALES
NJ	08817	_____	EDISON	135 NATIONAL ROAD	MCD	PLANT
NJ	08332	_____	MILLVILLE	P.O. BOX 150 SOUTH 2ND ST.	GLASS	PLANT
NJ	08854	_____	PISCATAWAY	SOUTH RANDOLPHVILLE RD AT RT. 287	MCD	PLANT

NY	14618	_____	ROCHESTER	1467 MONROE AVENUE	GLASS	SALES
NY	10607	_____	WHITE PLAINES	297 KNOLLWOOD RD.	GLASS	SALES
OH	43502	_____	ARCHBOLD	R.R. #3, BOX 9B	MCD	PLANT
OH	45246	_____	CINCINNATI	#7 TRIANGLE PARK DRIVE	GLASS	SALES
OH	43227	_____	COLUMBUS	6100 CHANNINGWAY BLVD.	MCD	SALES
OH	43302	_____	MARION	1240 WEST CENTER STREET	MCD	PLANT
OH	43207	_____	OBETZ	2120 BUZICK DRIVE	MCD	PLANT
OH	44481	_____	WARREN	GRISWOLD STREET EXIT	MCD	PLANT
OK	73179	_____	OKLAHOMA CITY	3400 SOUTH COUNCIL ROAD	MCD	PLANT
OK	73107	_____	OKLAHOMA CITY	3810 NORTHWEST 3RD STREET	PLATICS	PLANT
PA	18051	_____	FOGELSVILLE	100 NATIONAL DRIVE	MCD	PLANT
PA	17331	_____	HANOVER	RD H3 BOX 22	MCD	PLANT
PA	16301	_____	OIL CITY (CLOSED)	P.O. BOX 334, ROUSEVILLE RD.	GLASS	PLANT
PA	15235	_____	PITTSBURGH	201 PENN CENTER BLVD., OFFICE 407	GLASS	SALES
PA	19462	_____	PLYMOUTH MEETING	661 WEST GERMANTOWN PIKE	GLASS	SALES
PA	19482	_____	VALLEY FORGE	P.O. BOX 964	MCD	SALES
SC	29010	_____	BISHOPVILLE	609 COUGAR STREET	MCD	PLANT
TN	38017	_____	COLLIERVILLE	110 SOUTH BYHALLIA ROAD	MCD	PLANT
TN	38119	_____	MEMPHIS	1255 LYNFIELD ROAD	MCD	SALES
TX	76011	_____	ARLINGTON	2205 EAST RANDOL HILL ROAD	MCD	SALES
TX	76140	_____	FORT WORTH	8800 SOUTH FREEWAY	MCD	PLANT
TX	77029	_____	HOUSTON	8501 EAST FREEWAY	MCD	PLANT
TX	77339	_____	KINGWOOD	2218 NORTH PARK, SUITE K	MCD	SALES
TX	75165	_____	WAXAHACHIE	P.O. BOX 677, I HWY 35-E AT HWY 287	GLASS	PLANT

WA	98031	_____	KENT	1220 NORTH SECOND AVENUE	MCD	PLANT
WA	98055	_____	RENTON	15 SOUTH GRADY WAY	MCD	SALES
WA	98660	_____	VANCOUVER	2601 N.W. LOWER RIVER ROAD	MCD	PLANT
WI	53105	_____	BURLINGTON	P.O. BOX 120, SOUTH McHENERY ST.	PLANT	SALES
WI	54306	_____	GREEN BAY	P.O. BOX 2386	MCD	PLANT
WI	53222	_____	WAUWATOSA	10721 WEST CAPITOL DRIVE	GLASS	SALES

Appendix J

XEROX CORPORATION STIPULATION OF FACTS

[Filed May 17, 1985]

IN THE SUPERIOR COURT OF WASHINGTON
FOR THURSTON COUNTY

XEROX CORPORATION,
Plaintiff,

v.

STATE OF WASHINGTON,
DEPARTMENT OF REVENUE,
Defendant.

NO. 84-2-01916-3

STIPULATION OF FACTS

The parties jointly stipulate that to the best of their knowledge and belief the following facts are true and correct:

1. Xerox Corporation ("Xerox") is a New York corporation, having its corporate office in Stamford, Connecticut.

2. Xerox manufactures and sells office equipment. Xerox products are sold throughout the world. None of this equipment is manufactured in Washington State.

3. Xerox operates manufacturing facilities in New York, California, and Texas. Xerox maintains offices in 48 states, including Washington.

4. Xerox operates regional distribution centers. Each distribution center handles specific and limited product lines. For example, Xerox duplicating equipment sold in Washington is distributed through the Santa Fe Springs, California, regional distribution center. Xerox typewriters and other nonduplicating office equipment sold in Washington are distributed through the Dallas, Texas, regional distribution center. Xerox office supplies sold in Washington are distributed through the Compton,

California, distribution center. Xerox does not operate a distribution center in Washington.

5. Xerox's administrative functions are performed in regional headquarters. For example, Xerox sales representatives selling in Washington are responsible to a regional sales office in Walnut Creek, California. Xerox's West Coast tax operations are headquartered in Santa Ana, California. The Santa Ana office has responsibility for tax planning in 17 western states, including Washington. Credit collection policy, advertising and marketing strategy, and salesmen compensation plans are developed and administered at Xerox's Rochester, New York, office. Central administrative functions are not performed in Washington.

6. The original cost of Xerox's property in Washington was $25,919,898. The original cost of its property everywhere (including Washington) was $4,544,650,836. (Both costs are as of 1983 and include leased property, based on eight times the net annual rental rate.)

7. In order to sell Xerox-manufactured products in Washington and elsewhere, Xerox employs many people outside the state of Washington, including factory workers, engineers, architects, scientists, laboratory technicians, accountants, lawyers, office personnel, warehouse personnel, computer programmers, data processors, and other employees. Their activities outside Washington contribute to the value of the products that are sold in Washington. The cost of their activities is included in the price Xerox receives for those products.

8. Xerox employs approximately 55,000 people. Approximately 460 of Xerox's employees are in Washington and 54,540 are in other states. In 1983, Xerox's Washington payroll was $13,875,256. Its total payroll everywhere in 1983 was $1,751,280,789.

9. In order to sell Xerox-manufactured products in Washington, Xerox maintains sales offices, services offices, and a products demonstration center in Washington, and employs sales representatives, service technicians, clerical/administrative personnel, and others in Washington whose

activities contribute to the value of products sold in this state. The cost of their activities is included in the price Xerox receives for those products.

10. As reported on returns filed with the Washington State Department of Revenue for business and occupation tax purposes, Xerox's annual Washington sales of products manufactured outside Washington ranged from $64.4 million to $75.7 million during the period January 1, 1980, through December 31, 1984. Xerox paid retailing and wholesaling taxes to Washington of $1,537,075.68 during that period.

11. Xerox's 1983 total sales everywhere were $4,963,342,857. Its 1983 sales in Washington were $67,569,385.

12. Xerox pays taxes to other jurisdictions on income derived from its sale of products in Washington. Xerox pays taxes to the states of California and New York on the income Xerox derives from manufacturing goods in those states and selling them in Washington. Xerox's gross proceeds from the same goods are also used by Washington as the measure of its retailing and wholesaling taxes on Xerox. The income taxed by California and New York is Xerox's gross receipts (i.e., its gross income of every kind and from every source, including its gross proceeds from goods manufactured in those states and sold in Washington), minus certain deductions permitted by statute, and multiplied by an apportionment factor. California's and New York's taxes are apportioned on the basis of a three-factor formula that compares Xerox's property, payroll, and sales in those states to its property, payroll, and sales everywhere. For goods Xerox manufactures in California or New York and sells in Washington, the property and payroll of Xerox's plant that produces those goods, its distribution centers, and its corporate and/or regional headquarters located in the manufacturing state are included in the numerator of that state's property and payroll factors, respectively.

13. Xerox borrowed and invested funds during the years 1980 through 1984 in the generally available money markets. Xerox's experience with respect to the cost of borrowing

money and its return on invested money reflected the prevailing market rates of interest.

14. No claims for refund are made by Xerox in this action on behalf of any corporation that is or has been a subsidiary or affiliate of Xerox. This stipulation is not a waiver of any such claims and is without prejudice to any right any past or present Xerox subsidiary or affiliate corporation may have to seek such relief in a separate action.

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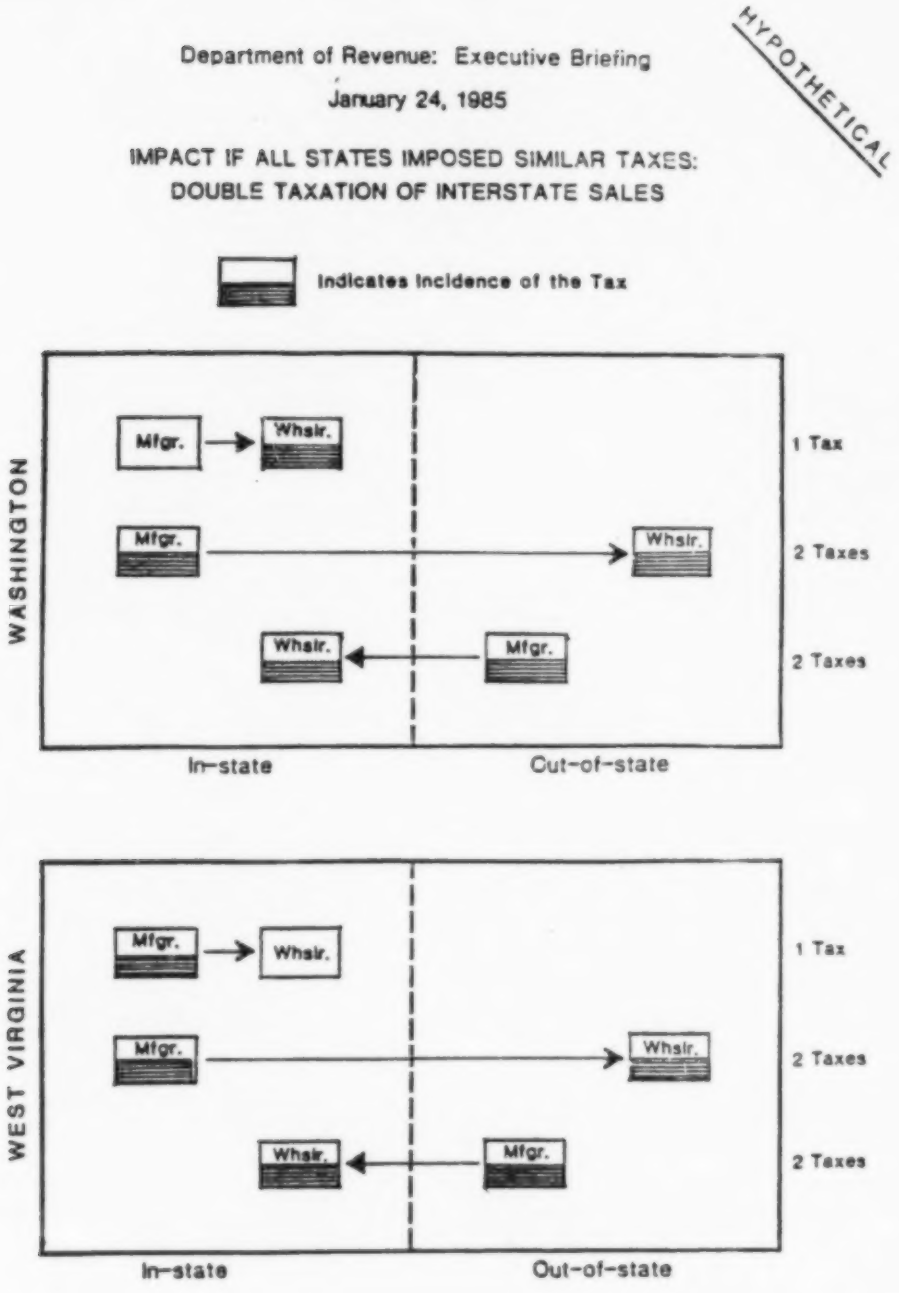
Appendix K

State of Washington
Executive Briefing Chart*



*Washington State Senate Committee on Ways and Means, Report on SB 4228 (March 7, 1985).

Supreme Court, U.S.
FILED
JUL 3 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-2006

IN THE

SUPREME COURT

OF THE
UNITED STATES

OCTOBER TERM, 1985

NATIONAL CAN CORPORATION, et al.,

Appellants,

v.

STATE OF WASHINGTON, DEPARTMENT OF REVENUE,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF WASHINGTON

MOTION TO DISMISS OR AFFIRM

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QUESTIONS PRESENTED

Washington imposes a tax on the business activities of selling and manufacturing, within the state, measured by the gross proceeds derived from those activities. The tax applies at essentially the same rate and measure to (1) the in-state manufacture of goods sold elsewhere; (2) the in-state sale of goods manufactured elsewhere; and (3) the in-state sale of goods both manufactured and sold in-state.

This case presents the following questions regarding that tax:

(1) May Washington impose its manufacturing tax on goods manufactured in Washington and sold elsewhere if it also imposes its selling tax, at the same rate and measure as the manufacturing tax, on goods both manufactured and sold in Washington?

(2) May Washington impose its selling tax on goods manufactured elsewhere and sold in Washington if it also imposes its selling tax, at the same rate and measure, on goods both manufactured and sold in Washington?

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No. 85-2006

IN THE

SUPREME COURT

OF THE

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OCTOBER TERM, 1985

NATIONAL CAN CORPORATION, et al.,

Appellants,

v.

STATE OF WASHINGTON, DEPARTMENT OF REVENUE,

Appellee.

On Appeal From The Supreme Court Of The State of Washington

MOTION TO DISMISS OR AFFIRM

MOTION TO DISMISS OR AFFIRM

Appellee, State of Washington, Department of Revenue, moves the Court to dismiss the appeal herein or, in the alternative, to affirm the judgment of the Washington State Supreme Court on the ground that the questions presented are so unsubstantial as to require no further argument.

STATEMENT

National Can Corporation (NCC) challenges the validity of Washington's business and occupation (B&O) taxes paid on its business activities in Washington. We begin by briefly describing the tax and its application to NCC.

I. WASHINGTON'S B&O TAX.

Washington's B&O tax is levied on persons "for the act or privilege of engaging in business activities." Wash. Rev. Code § 82.04.220. J.S. E-1. This case involves taxes on the activities of selling and manufacturing.

Washington imposes a selling B&O tax upon "every person * * * engaging within this state in the business of making sales" either at wholesale or retail. Wash. Rev. Code §§ 82.04.270 and 82.04.250. J.S. E-2 and 4. The measure of the tax is the gross proceeds of Washington sales. The basic rate of the selling tax is .0044.

Washington also imposes a manufacturing B&O tax upon "every person * * * engaging within this state in business as a manufacturer." Wash. Rev. Code § 82.04.240. J.S. E-2. The measure of the tax is "the value of products" manufactured, which is determined by "the gross proceeds derived from the sale thereof." Wash. Rev. Code § 82.04.450. J.S. E-8. The basic rate of the manufacturing tax is also .0044.

At issue in this case is the operation of the so-called "multiple activities exemption," Wash. Rev. Code § 82.04.440. J.S. E-8. Under this statute "persons taxable under [retailing] or [wholesaling] shall not be taxable under [manufacturing] with respect to * * * manufacturing of the product so sold" *i.e.*, of the products actually taxed under the selling B&O tax.

The end result of these statutes is that all products sold and/or manufactured in Washington are subject to one B&O tax, either selling or manufacturing. The measure of that tax (gross proceeds of sale/value of the products) and the rate of that tax (.0044)[1] are essentially identical.

---

[1]During part of the period for which NCC seeks a refund a surtax was imposed in addition to the selling and manufacturing B&O taxes. Effective July 1, 1983 the combination of the basic rate (.0044) and the surtax for the wholesaling and manufacturing B&O taxes was .00484. The combination for retailing B&O tax was .00471. Wash. Rev. Code §§ 82.04.240, 82.04.250, 82.04.270, 82.04.2901 and 82.04.2904. J.S. E-2, 4, 6 and 8.

II. APPLICATION OF THE B&O TAX.

NCC challenges the imposition of both selling and manufacturing B&O tax. For this reason NCC represents the basic factual pattern for all the appellants in this case.

NCC sells packaging products throughout the world. These products are manufactured by NCC in twenty-two states, including Washington. J.S. I-1, ¶¶ 2 and 3. In Washington NCC employs appoximately 240 people. These employees are involved in the manufacture of products at plants located in this state. This number also includes NCC's Washington sales office. J.S. I-2, ¶¶ 6, 7 and 8.

During the period January 1, 1980 through December 31, 1984, NCC paid selling B&O tax (wholesaling) of $606,863 on sales of products in Washington that were manufactured elsewhere. J.S. I-2, ¶ 9. NCC seeks a refund of this selling B&O tax.[2]

Also during this period NCC paid manufacturing B&O tax of $372,843 on products manufactured in Washington and sold elsewhere. J.S. I-3, ¶ 10. NCC seeks a refund of this manufacturing B&O tax.[3]

In addition, NCC paid selling B&O tax of $1,800,000 on products *both* manufactured and sold in Washington. NCC did not pay manufacturing B&O tax on these products. NCC does not seek refund of this sum. J.S. I-3, ¶ 11.

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[2]Some of the appellants such as Xerox Corporation seek only refund of selling B&O tax. Xerox sells office equipment throughout the world. None of Xerox's manufacturing is done in Washington. J.S. J-1, ¶ 2. Xerox employs approximately 460 people in Washington engaged in the sales and service of Xerox products. J.S. J-2, ¶¶ 8 and 9. During the period January 1, 1980 through December 31, 1984, Xerox paid Washington selling B&O tax (wholesaling and retailing) in the amount of $1,537,075. J.S. J-3, ¶ 10. Xerox seeks refund of this selling B&O tax and its arguments are identical to those of NCC.

[3]Some of the appellants such as Kalama Chemical, Inc. seek only a refund of manufacturing B&O tax. Kalama sells chemical products. These products are manufactured by Kalama in Washington and New Jersey; however, none of the products manufactured in New Jersey are sold in Washington. J.S. H-1, ¶¶ 2 and 3. Kalama employs approximately 95 people in Washington involved in the management of the corporation and the manufacture of products at Kalama's plant in this

SUMMARY OF ARGUMENT

NCC claims that the selling and manufacturing B&O taxes violate the Commerce Clause of the U.S. Constitution, Art. I, § 8, cl. 3. This claim is based on NCC's contention that the Washington Supreme Court failed to follow the Court's recent decision in *Armco, Inc. v. Hardesty*, 467 U.S. 638 (1984).

It is now established that a state's tax applied to interstate commerce must meet four requirements under the Commerce Clause: (1) there must be a sufficient connection or nexus between the interstate activities and the taxing state; (2) the tax must not discriminate against interstate commerce; (3) the tax must be fairly apportioned; and (4) the tax must be fairly related to the services provided by the state. *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977).

In this case "nexus" is beyond issue owing to NCC's substantial selling and manufacturing activity in Washington. J.S. 5. NCC's substantial activity also ensures that the B&O taxes are fairly related to the services provided by the state and NCC does not claim otherwise in its Jurisdictional Statement.

Washington's B&O taxes are fairly apportioned under standards earlier laid down by this Court and not overturned in *Armco*. See *Standard Pressed Steel Co. v. Department of Revenue of Washington*, 419 U.S. 560 (1975). For example, in 1983 NCC's worldwide sales approximated $1.552 billion. Of this amount, approximately $110 million was allocated to Washington as gross proceeds of sales in this state. J.S. I-3, ¶ 13.

Thus, NCC's claim is reduced to the discrimination prong of the Commerce Clause test and its charge that the

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state. J.S. H-2, ¶¶ 5 and 6. During the period January 1, 1980 through December 31, 1984, Kalama paid Washington manufacturing B&O tax in the amount of $495,612 (including interest). J.S. H-2, ¶ 7. Kalama seeks refund of this manufacturing B&O tax and its arguments are identical to those of NCC.

decision reached below cannot be reconciled with the holding and reasoning of the Court in *Armco*.

This appeal does not present a substantial federal question. The B&O taxes at issue here are materially different from the taxes analyzed by the Court in *Armco*. Therefore, the majority's analysis requires a different result in this case.

Armco involved West Virginia's wholesaling tax. The Court's analysis striking down the tax can be divided into three parts.

First, the Court considered discrimination. 467 U.S. at 642. It ruled that West Virginia's wholesaling tax discriminated because it only applied if the property was manufactured out of the state and imported for sale. There was no wholesaling tax if the property was both manufactured and sold in West Virginia.

The Court's conclusion has no application to Washington's selling B&O tax because *all* Washington sales are subject to the tax. This is true regardless of where the goods are manufactured. Thus, the Washington selling tax, unlike the West Virginia wholesaling tax, does not apply solely to interstate commerce.

The second part of the majority opinion focused on West Virginia's claim that the wholesaling tax was a compensating tax for the manufacturing tax. 467 U.S. at 642-643. Based on its analysis of these taxes, the Court concluded that it was not.

Washington's selling and manufacturing B&O taxes are materially different from West Virginia's taxes in the two areas analyzed by the Court — the rate of the tax and the measure of the tax. The rates of West Virginia's wholesaling and manufacturing taxes were different, .0027 and .0088, respectively. The rates of Washington's selling and manufacturing B&O taxes are virtually identical — .0044.

The measures of West Virginia's wholesaling and manufacturing taxes were also different, if the manufacturing took place partially within and partially without West Virginia. The measure of Washington's selling and

manufacturing taxes is the same — gross proceeds of sale/value of the products.

The dissimilarities in West Virginia's wholesaling and manufacturing taxes led the Court to conclude that they were not compensating taxes. The similarity of Washington's selling and manufacturing B&O taxes compel the opposite conclusion.

The third part of the majority opinion considered West Virginia's argument that Armco be required to prove actual discriminatory impact. 467 U.S. at 644-646. The Court ruled that no actual discriminatory impact need be shown where a tax on its face discriminates against interstate commerce. In this part of the decision the majority makes reference to the concept of "internal consistency."

NCC argues that the selling and manufacturing B&O taxes discriminate against interstate commerce because they lack "internal consistency." Essentially, NCC claims that the majority grafted this concept onto the discrimination prong of the Commerce Clause test.

NCC's argument misconstrues the Court's discussion of internal consistency. The Court did not graft it onto the discrimination prong, and the Court's actual discussion in *Armco* proves it. Indeed, the Court has consistently refused to apply an internal consistency type test to establish discrimination in its decisions both before and *after Armco.*

The Commerce Clause decisions of the Court prohibit a state tax from providing a direct commercial advantage to local business. The selling and manufacturing B&O taxes provide no such advantage for they are neutral. One thousand dollars of goods sold and/or manufactured in Washington are subject to one tax of $4.40 ($1,000 x .0044). Thus, these taxes neither channel the flow of interstate commerce into nor out of Washington.

The decision below is correct both under *Armco* and the Court's prior Commerce Clause opinions on discrimination. Indeed, *Armco,* itself, is consistent with the Court's prior Commerce Clause decisions. The majority neither

overruled any prior opinions of the Court nor announced any new Commerce Clause principles.

ARGUMENT

THIS CASE PRESENTS NO SUBSTANTIAL FEDERAL QUESTION AND THE DECISION BELOW IS CLEARLY CORRECT

I. THE SELLING AND MANUFACTURING B&O TAXES DO NOT DISCRIMINATE AGAINST INTERSTATE COMMERCE.

To establish that no further argument is required in this case, we will examine *Armco* and the discrimination prong of the Commerce Clause test in some detail, as applied to the selling and manufacturing B&O taxes.

A. The Discrimination Test Under The Commerce Clause.

The discrimination test embodies two basic principles. First, the Commerce Clause prohibits a state from imposing a tax "which discriminates against interstate commerce by providing a direct commercial advantage to local business." *Boston Stock Exchange v. State Tax Commission*, 429 U.S. 318, 329 (1977). The Court has identified two kinds of tax systems that violate this principle.

The first improper tax system *discourages* interstate commerce by using discriminatory taxes "to assure that residents trade only in intrastate commerce." *Boston Stock Exchange*, 429 U.S. at 334-335. Thus, a state "may not tax a transaction or incident more heavily when it crosses state lines than when it occurs entirely within the State." *Armco*, 467 U.S. at 642. This is the rationale of the majority in the first part of the *Armco* opinion.

The second prohibited tax system improperly *encourages* interstate commerce by using "discriminatory taxes to assure that nonresidents direct their commerce to busi-

nesses within the State * * * *" *Boston Stock Exchange*, 429 U.S. at 334-335. Under this principle the Court has struck down tax systems which allow an interstate business to reduce its tax burden, in the taxing state, by increasing its business in that state.

For example, in *Westinghouse Electric Corp. v. Tully*, 466 U.S. 388 (1984), a credit to New York's franchise tax was struck down because it reduced a business' tax from $420 to $406 if the business increased its percentage of shipping out of New York from 0 to 100 percent. 466 U.S. at 400 (Table A).[4]

The second principle of the discrimination test is the converse of the first: a state is not prohibited from structuring its tax system "to encourage the growth and development of intrastate commerce and industry" or "to compete with other States for a share of interstate commerce" so long as it does not "discriminatorily tax the products manufactured or the business operations performed in any other State." *Boston Stock Exchange*, 429 U.S. at 336-337. Accord. *Armco* 467 U.S. at 645-646. Thus, states are free to use taxes to encourage growth and compete for commerce so long as the taxes do not (1) assure residents trade only in intrastate commerce or (2) allow an interstate business to reduce its tax burden, in the taxing state, by doing more business there.

B. The Decision Below Sustaining The Selling B&O Tax is Clearly Correct.

Washington's selling B&O tax is the same tax sus-

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[4]Similarly, the Court struck down credits in *Maryland v. Louisiana*, 451 U.S. 725 (1981) and *Boston Stock Exchange*, 429 U.S. 318 (1977) because a business could reduce its taxes, in the taxing state, by increasing its business in that state. In *Maryland v. Louisiana*, a credit made it possible for a business to reduce its Louisiana tax burden from $70 to $35 if it did additional business in Louisiana. 451 U.S. at 757 (n. 28). In *Boston Stock Exchange*, a nonresident making taxable transactions in New York could reduce his or her tax rate by 50 percent if the stock was also sold in New York. If the stock was sold outside New York there was no reduction. 429 U.S. at 324.

tained by this Court in *General Motors Corp. v. Washington*, 377 U.S. 436 (1964), *Standard Pressed Steel*, 419 U.S. 560 (1975), and *Chicago Bridge & Iron Co. v. Washington Department of Revenue*, 98 Wn.2d 814, 659 P.2d 463 (1983), *appeal dism'd*, 464 U.S. 1013 (1983). The decision below, which again sustains the selling tax, is also correct.

1. **Because all Washington sellers pay the selling B&O tax, that tax does not violate Armco.**

In the first part of the *Armco* decision the Court struck down West Virginia's wholesaling tax because it applied only to interstate sales. In the words of the Court:

> The tax provides that two companies selling tangible property at wholesale in West Virginia will be treated differently depending on whether the taxpayer conducts manufacturing in the State or out of it. Thus, if the property was manufactured in the State, no tax on the sale is imposed. If the property is manufactured out of the State and imported for sale, a tax of 0.27% is imposed on the sale price.

467 U.S. at 642.

This is not true in Washington. The selling B&O tax applies to all sales in this state, without regard to where the goods are manufactured. Thus, the majority opinion in *Armco* has no application whatsoever to Washington's selling B&O tax.

NCC concedes that: "Both the out-of-state and in-state manufacturer pay the Washington selling tax." J.S. 8. NCC alleges that there is discrimination because "Washington grants the in-state manufacturer an exemption" and the "out-of-state manufacturer receives no such benefit." J.S. 8. Basically, NCC complains that it does not receive an exemption from a manufacturing tax to which it is not subject.

In fact, in-state and out-of-state manufacturers selling in Washington are treated in an identical manner. The

only benefit an in-state manufacturer receives is an exemption from Washington's manufacturing B&O tax, *if selling B&O tax is paid* on the manufactured goods. This is by reason of the multiple activities exemption, Wash. Rev. Code § 82.04.440. An out-of-state manufacturer selling in Washington is similarly exempt from Washington's manufacturing B&O tax because the manufacturing activity does not take place "within this state." Wash. Rev. Code § 82.04.240.

NCC, itself, proves this point. NCC sells in Washington goods manufactured in this state and elsewhere. J.S. I-2 and 3, ¶¶ 9 and 11. All of these goods are subject to Washington's selling B&O tax. None of these goods are subject to Washington's manufacturing B&O tax. Clearly, the decision below sustaining the selling B&O tax does not conflict with *Armco*.

2. Washington's selling B&O tax does not provide a direct commercial advantage to local business.

The decision below is clearly correct because Washington's selling B&O tax does not provide a direct commercial advantage to local business.

As we have seen, the selling B&O tax does not *discourage* interstate commerce, since all sales in Washington are subject to the tax. Also, the selling B&O tax does not improperly *encourage* interstate businesses to direct their commerce into Washington.

Unlike the tax system struck down in *Westinghouse v. Tully*, 466 U.S. 388 (1984), an out-of-state manufacturer cannot reduce its Washington tax by increasing its business in this state. When NCC manufacturers $1,000 of goods elsewhere and sells them at wholesale in Washington, it pays $4.40 in wholesaling B&O tax ($1,000 x .0044). If NCC moved its manufacturing operations into Washington it would also pay $4.40 on the sale of $1,000 of goods both manufactured and sold here.

In *Boston Stock Exchange*, 429 U.S. 318 (1976), the Court recognized, in dicta, that this kind of equal treatment does not provide a direct commercial advantage to local business. The Court discussed the New York tax system as it existed prior to the 1968 amendments, which the Court ultimately struck down. Under the earlier system, New York imposed a tax on five separate taxable events. The tax applied if any one of the taxable events took place in New York. However, if more than one event took place in New York, only one tax was due. 429 U.S. at 321-322.

The pre-1968 New York tax is remarkably similar to the Washington system. A number of separate activities are subject to tax (*e.g.*, selling and manufacturing) but only one tax is paid. Such a system does not provide a direct commercial advantage to local business according to the Court in *Boston Stock Exchange* because:

> [T]he choice of an exchange for the sale of securities that would be transferred or delivered in New York was not influenced by the transfer tax; wherever the sale was made, tax liability would arise. The flow of interstate commerce in securities was channeled neither into nor out of New York by the state tax.

429 U.S. at 330.

Here, too, the flow of selling and manufacturing is channeled neither into nor out of Washington by the state tax. Since the selling tax does not discriminate against interstate commerce and the decision below does not conflict with *Armco*, NCC's appeal of the selling B&O tax does not present a substantial federal question.

C. The Decision Below Sustaining The Manufacturing B&O Tax is Clearly Correct.

Washington's manufacturing B&O tax, by its terms, applies to all manufacturing "within the state." Wash. Rev. Code § 82.04.240. The operation of the multiple activities exemption, Wash. Rev. Code § 82.04.440, limits the application of the manufacturing B&O tax to two situations.

First, if a business manufactures goods in Washington for its own use, instead of buying them (which would result in selling B&O tax upon the seller), it is subject to manufacturing B&O tax. Since there is no sale, no selling B&O tax is paid, and the multiple activities exemption does not operate.[5]

The second situation is where goods are manufactured in Washington and sold outside this state. Since the goods are sold elsewhere, there is no selling B&O tax paid on the sale and the multiple activities exemption does not operate. This is the manufacturing B&O tax at issue here.

1. The manufacturing B&O tax is distinguishable from the wholesaling tax in Armco.

Under the first part of the *Armco* opinion the manufacturing B&O tax appears discriminatory. However, the Court has long recognized that a tax which appears to discriminate will be sustained if it is a "compensating tax." The best known example of a "compensating tax" is the use tax. The use tax appears discriminatory because it applies principally to goods brought in from other states. However, the use tax was sustained by the Court in *Henneford v. Silas Mason Co.*, 300 U.S. 577 (1937) and *Southern Pacific Co. v. Gallagher*, 306 U.S. 167 (1939) because it compensated for the retail sales tax. Together the two taxes resulted in equal treatment of goods purchased or brought into the state. This takes us to the second part of the *Armco* opinion which deals with the "compensating tax" question.

In the second part of *Armco* the majority concludes that West Virginia's wholesaling tax "cannot be deemed a 'compensating tax' for the manufacturing tax." 467 U.S. at 642. NCC asserts that the decision below is in conflict with

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[5]During the period 1980-1984 NCC paid approximately $10,000 in manufacturing B&O tax on goods manufactured in Washington for its own use. These manufacturing taxes are not at issue in this appeal. J.S. I-4, ¶ 17. If NCC had purchased these goods in Washington the seller would have been subject to selling B&O tax in the same amount.

Armco because the Washington Supreme Court ruled that the manufacturing B&O tax is a compensating tax. J.S. 11.

This assertion rests on two points. First, NCC claims that under *Armco* wholesaling and manufacturing can *never* be "substantially equivalent events" and thus, a manufacturing tax can *never* be a compensating tax. J.S. 11 and 12. Second, NCC claims that Washington's tax system is the "mirror image" of West Virginia's. NCC's argument miscontrues *Armco* and mischaracterizes Washington's B&O taxes.

NCC misconstrues *Armco* because the Court did not rule that manufacturing and selling could *never* be "substantially equivalent events." The Court stated: "Here, too, manufacturing and wholesaling are not substantially equivalent events." 467 U.S. at 463. The context makes it clear that the Court is speaking of West Virginia's manufacturing and wholesaling taxes — not manufacturing and selling taxes in general.[6] The Court reached its conclusion by analyzing specific features of the West Virginia tax system. NCC ignores this analysis.

NCC mischaracterizes Washington's B&O taxes because they are not the mirror image of the taxes in West Virginia. Washington's taxes are different and they are different in the critical areas upon which the Court in *Armco* focused its analysis.

The *Armco* Court focused first on the rate of tax. In

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[6]In *Hinson v. Lott*, 75 U.S. 148 (1868) the Court recognized that a selling and manufacturing tax could be compensating taxes. There the taxpayer challenged a tax imposed by Alabama on the introduction of liquor into the state for sale. The rate of tax was fifty cents per gallon. The Court ruled that this tax did not discriminate against interstate commerce because of another tax "imposed by the previous sections of the same act of fifty cents per gallon on all whiskey and all brandy from fruits manufactured in the State." 75 U.S. at 152-153. When the manufacturing tax and selling tax were considered together the Court ruled there was no discrimination because "no greater tax is laid on liquors brought into the State than on those manufactured within it." 75 U.S. at 153. The Court relied on *Hinson v. Lott* to support its decision that the use tax was a compensating tax in *Henneford v. Silas Mason Co.*, 300 U.S. 577, 585 (1937).

West Virginia the rate of manufacturing tax was .0088. 467 U.S. at 641 (n. 5). The rate of wholesaling tax was .0027. 467 U.S. at 640 (n. 2). In analyzing this fact the Court said: "Manufacturing frequently entails selling in the State, but we cannot say which portion of the manufacturing tax is attributable to manufacturing, and which portion to sales." 467 U.S. at 643.

This is not true in Washington. The rate of the selling and manufacturing B&O taxes is virtually identical — .0044. Here, the manufacturing B&O tax compensates completely for the selling B&O tax. In-state and out-of-state manufacturers are treated in an equal manner, which was not true in West Virginia.

The majority in *Armco* next examined the measure of the manufacturing tax. In West Virginia the measure of the manufacturing tax was the value of the products — unless the manufacturing took place partially within and partially without West Virginia. In the latter case the measure was apportioned on the basis of cost.[7] Based on this fact the Court stated:

> The fact that the manufacturing tax is not reduced when a West Virginia manufacturer sells its goods out of State, and that it is reduced when part of the manufacturing taxes place out of State, makes clear that the manufacturing tax is just that, and not in part a proxy for the gross receipts tax imposed on *Armco* and other sellers from other States."

467 U.S. at 643.

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[7]West Virginia Code § 11-13-2(b)(f) states:

It is further provided, however, that in those instances in which the same person partially manufactures, compounds or prepares products within this state and partially manufactures, compounds or prepares such products outside of this state the measure of this tax under this section shall be that proportion of the sale price of the product that the payroll cost of manufacturing within this state bears to the entire payroll cost of manufacturing the product; or, at the option of the taxpayer, the measure of his tax under this section shall be the proportion of the sales value of the articles that the cost of operations in West Virginia bears to the full cost of manufacture of the articles.

This is not true of Washington's manufacturing B&O tax. The measure of this tax is the full "value of the products" manufactured. Also, the measure of both the selling tax and the manufacturing tax is virtually identical. This is because Wash. Rev. Code § 82.04.450 defines "value of the products" in terms of the "gross proceeds derived from the sale thereof." Thus, Washington's manufacturing B&O tax is designed as a compensating tax — that is, a proxy for Washington's B&O tax on selling.

The decision below is consistent with *Armco* because the Washington Supreme Court followed the same analytical steps as the majority. It reached a different conclusion because of differences between the Washington and West Virginia tax systems.

2. Washington's manufacturing B&O tax meets the criteria for a compensating tax and does not discriminate against interstate commerce.

The decision below is also clearly correct in its conclusion that Washington's manufacturing B&O tax meets the "compensating tax" criteria established by the Court. As a result the manufacturing B&O tax does not discriminate against interstate commerce because it does not provide a direct commercial advantage to local business.

In *Maryland v. Louisiana*, 451 U.S. 725 (1981) the Court established the criteria for determining if a tax is a compensating tax. First, the compensating tax must be "designed to meet [the] same ends" as the tax for which it compensates. Second, the two taxes must result in "equal treatment of in-state and out-of-state taxpayers similarly situated." 451 U.S. at 759. A tax which meets these two criteria is valid as a compensating tax and does not discriminate against interstate commerce. Washington's manufacturing B&O tax meets these criteria.

First, the manufacturing and selling B&O taxes are designed to meet the same ends, that is, uniform treatment

of goods manufactured and/or sold in this state. In this respect, the purpose of the manufacturing and selling B&O taxes is similar to the sales and use tax where "a State is attempting to impose a tax on a substantially equivalent event to assure uniform treatment of goods and materials to be consumed in the State." *Maryland v. Louisiana*, 451 U.S. at 759.

Second, the manufacturing and selling B&O taxes result in equal treatment of in-state and out-of-state taxpayers similarly situated. A business that manufactures and/or sells in Washington pays the same amount of Washington tax.

Thus, when NCC manufactures and sells $1,000 of goods in Washington, it pays selling B&O tax of $4.40 ($1,000 x .0044). When NCC manufactures those goods elsewhere and sells them in Washington, it also pays selling B&O tax of $4.40. When NCC manufactures those goods in Washington and sells them elsewhere, it is subject to manufacturing B&O tax of $4.40. Indeed, when NCC manufactures those goods in Washington for its own use, the manufacturing B&O tax is the same.

Unlike the wholesaling tax in West Virginia, Washington's manufacturing B&O tax meets the compensating tax criteria. The manufacturing B&O tax does not discriminate against interstate commerce because it neither discourages interstate commerce nor improperly encourages interstate businesses to direct their commerce into Washington. For this reason the decision below is clearly correct and does not raise a substantial federal question.

D. The Concept of Internal Consistency Does Not Invalidate The Selling and Manufacturing B&O Taxes.

1. Armco did not graft the concept of internal consistency onto the discrimination prong of the Commerce Clause test.

NCC also claims that the Washington Supreme

Court's decision is inconsistent with *Armco* because it did not apply the concept of "internal consistency" to invalidate both of Washington's B&O taxes. J.S. 9. Essentially, NCC argues that *Armco* grafted the concept of internal consistency onto the discrimination prong of the Commerce Clause test.

NCC's argument amounts to this: even though the selling B&O tax is imposed on *all* sellers, the concept of internal consistency renders that tax discriminatory. Thus, NCC would assert that under *Armco* the West Virginia *manufacturing* tax, which was applicable to *all* manufacturers, would have been held discriminatory. Internal consistency is discussed in the third part of the majority's opinion. 467 U.S. at 644. NCC takes the Court's discussion completely out of context. The decision below is faithful to the majority's analysis in *Armco*.

The Court's discussion of internal consistency in *Armco* was in response to West Virginia's argument that Armco be required "to prove actual discriminatory impact." 467 U.S. at 644.

The Court rejected this argument. According to the majority, a showing of "actual discriminatory impact" by reason of another state's taxes:

> [I]s not the test. In *Container Corp. of America v. Franchise Tax Board*, 463 U.S. 159, 169 (1983) the Court noted that a tax must have "what might be called internal consistency — that is the [tax] must be such that, if applied by every jurisdiction," there would be no impermissible interference with free trade.

467 U.S. at 644.

The internal consistency test in *Container Corp. of America v. Franchise Tax Board*, 463 U.S. 159 (1983), does not require one to prove actual discriminatory impact by pointing to another state's tax system. In *Armco*, the Court stated: "A similar rule applies where the allegation is that a tax on its face discriminates against interstate commerce." 467 U.S. at 644.

The "similar rule" is not the concept of internal consistency. It is the rule that "actual discriminatory impact" need not be shown where a tax discriminates on its face.

The rule that "actual discriminatory impact" need not be shown is necessary because "Any other rule would mean that the constitutionality of West Virginia's tax laws would depend on the shifting complexities of the tax codes of 49 other States * * * *" 467 U.S. at 644-645.

Thus, the majority did not graft the concept of "internal consistency" onto the discrimination prong of the Commerce Clause test.

2. The decision below is consistent with the decisions of this Court, both before and after Armco, which have dealt with the issue of internal consistency.

The Washington Supreme Court's decision is clearly correct. It is consistent with the Court's decisions both before and after *Armco* where the Court has refused to apply an internal consistency type test to the discrimination prong of the Commerce Clause. Specifically, the Court has refused to apply such a test in its analysis of use taxes challenged under the Commerce Clause.[8]

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[8]Additional proof that the Court has not grafted internal consistency onto the discrimination prong of the Commerce Clause can be found in *Boston Stock Exchange*, 429 U.S. 318 (1977) and *Westinghouse v. Tully*, 466 U.S. 388 (1984).

In *Boston Stock Exchange* New York's pre-1968 transfer tax system would not pass NCC's proposed internal consistency test. If another state had that tax system, interstate commerce could pay two taxes (e.g., one on the sale in the other state and a second on the delivery of securities in New York). If sale and delivery both took place in New York there would be only one tax. The Court concluded that this pre-1968 system did not discriminate because it was "neutral as to in-state and out-of-state sales * * * The flow of interstate commerce in securities was channeled neither into nor out of New York by the state tax." 429 U.S. at 330.

On the other hand, in *Westinghouse v. Tully* the Court struck down a tax as discriminatory — even though it *had* internal consistency. The question before the Court was whether a credit to New York's

In all sales and use tax systems the taxing state (e.g., State A) imposes either its sales tax or its use tax on goods. The state does not impose both taxes on the same goods. This is normally accomplished by State A exempting from its use tax those items which have already been subject to its sales tax, upon the sale to the present user. Because of this exemption, the use tax normally applies only to items which the user has purchased outside State A (e.g., in State B) beyond the reach of State A's sales tax.

State A's use tax violates NCC's proposed internal consistency test if it provides no exemption or credit for sales taxes paid in other states (e.g., State B). Thus, goods purchased and used in State A are subject to one tax — State A's sales tax. Goods purchased in State B and brought into State A are subject to two taxes — State B's sales tax and State A's use tax.

Precisely such an internally inconsistent sales and use tax system was before this Court in *Southern Pacific v. Gallagher*, 306 U.S. 167 (1939) where the Court considered a challenge to California's use tax.

If the California sales and use taxes were placed in another state, goods purchased in that other state and brought into California would bear two taxes — retail sales tax and use tax; for the California use tax allowed no credit or other offset for another state's sales tax. Goods purchased in California and used in California would bear only one tax — retail sales tax. Thus, internal consistency was the basis of the taxpayer's challenge.

If lack of internal consistency is a form of unconstitutional discrimination the Court should have invalidated California's use tax. It did not. Instead, the Court ruled

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franchise tax discriminated against interstate commerce. The credit was perfectly apportioned, i.e., it had internal consistency. New York attempted to defend the credit on this basis. Despite its internal consistency the Court struck down the credit under the discrimination prong. The fact that the tax was fairly apportioned, i.e., internally consistent, did not save it. As the Court observed: " 'Fairly apportioned' and 'nondiscriminatory' are not synonymous terms." 466 U.S. at 399.

that: "[T]his is not a discrimination in the law." 306 U.S. at 172.

The mechanics of NCC's proposed internal consistency test require one to assume that the challenged taxes exist in another state. This the Court in *Southern Pacific* specifically refused to do because "It will be time enough to resolve that argument 'when a taxpayer paying in the state of origin is compelled to pay again in the state of destination.' " 306 U.S. at 172 (quoting *Henneford v. Silas Mason Co.*, 300 U.S. 577, 587 (1937)).

In *Williams v. Vermont*, ___ U.S. ___, 105 S.Ct. 2465 (1985) the Court specifically affirmed its earlier ruling in *Southern Pacific*. *Williams* is particularly important because it was decided after *Armco*.

Williams invalidated Vermont's use tax on motor vehicles. The Vermont sales and use tax system would have failed NCC's proposed internal consistency test as applied to nonresidents. A nonresident would pay two taxes — the sales tax in the state of purchase and Vermont's use tax. A Vermont resident, buying in Vermont, would pay only Vermont sales tax.

The Court ultimately struck down the tax because the distinction between residents and nonresidents violated the equal protection clause. 105 S.Ct. at 2472. However, the Court specifically reaffirmed *Southern Pacific* and refused to apply an internal consistency type test. In the words of the Court:

> This Court has expressly reserved the question whether a State must credit a sales tax paid to another State against its own use tax * * * Appellants urge us to hold that it is a constitutional requirement. Brief for Appellants 31-35. Once again, however, we find it unnecessary to reach this question.

105 S.Ct. at 2471.

Williams is significant because *Armco* was specifically brought to the Court's attention. The pages of the

Brief for Appellant (31-35) referred to by the Court discuss its earlier opinion in *Armco*.

Southern Pacific and *Williams* confirm the fact that the Court has not grafted the internal consistency test onto the discrimination prong of the Commerce Clause.

Moreover, NCC is in precisely the same position as the taxpayer in *Southern Pacific*. Just as that taxpayer could show no doubling up between California's use tax and another state's sales tax, so too, NCC cannot show any doubling up between Washington's gross receipts tax — be it selling tax or manufacturing tax — and the counterpart tax of another state.

Like NCC here, the taxpayer in *Southern Pacific* was attempting to escape from an otherwise constitutionally permissible tax burden simply because of a purely hypothetical doubling up of taxes which in fact did not exist. The Court refused to allow such an easy escape. NCC should fare no better.

Following the approach adopted in *Southern Pacific* and *Williams*, this Court should decide the question of whether an internally inconsistent tax system is *per se* discriminatory and thus violative of the Commerce Clause only in a case in which an actual doubling up can be shown. *Armco* does not require that it do otherwise.

II. NCC MISREPRESENTS THE FACTS PERTAINING TO ITS APPORTIONMENT CLAIM.

NCC challenges the apportionment of the selling and manufacturing B&O taxes. J.S. 7 (n. 3). However, NCC does not claim that the Washington Supreme Court's decision on apportionment presents a substantial federal question. Since *Armco* did not concern apportionment, the decision below, on apportionment, cannot be in conflict with *Armco*. We address the apportionment issue only to correct two misstatements made by NCC which may mislead the Court.

First, NCC states that the parties have stipulated to the existence of a multiple tax burden in this case. J.S. 6 and 7 (n. 4). This is incorrect.

The parties stipulated that NCC is subject to taxes in other states measured by NCC's: "[G]ross income of every kind and from every source * * * minus certain deductions * * * and multiplied by an apportionment factor." J.S. I-3 and 4, ¶¶ 14 and 15.

The fact that NCC pays taxes measured by net income (gross income minus deductions) in other states, in addition to Washington's selling and manufacturing B&O taxes, does not constitute a multiple burden. The Court rejected this argument in *Exxon Corp. v. Department of Revenue of Wisconsin*, 447 U.S. 207 (1980). *Exxon* concerned formulary apportionment of income Exxon earned on oil and gas extracted in other states. Exxon argued that it was subject to a multiple burden because those other states imposed severance taxes on the extraction of the oil and gas. 447 U.S. at 228.

The Court ruled that this did not constitute a multiple burden because "Severance taxes, however, are directed at the gross value of the mineral extracted or the quantity of production rather than the net income derived from the production activities." 447 U.S. at 228 (n. 12).

The same is true of Washington's selling and manufacturing B&O taxes. These taxes are on the privilege of engaging in business. They are directed at the gross proceeds of sale or the value of the products manufactured.

Thus, NCC is in precisely the same position as the taxpayer in *General Motors Corp. v. Washington*, 377 U.S. 436 (1964). It has not demonstrated a multiple tax burden.

NCC's second misstatement is its assertion that the selling and manufacturing B&O taxes are unapportioned. J.S. 2. Again, this statement is incorrect.

Washington apportions its selling and manufacturing B&O taxes through the use of allocation. For example, in 1983 NCC's worldwide sales were approximately $1.552 billion. Of this amount approximately $110 million was

allocated to Washington as the "gross proceeds of sales" in this state. J.S. I-3, ¶ 13.

Washington taxes none of NCC's receipts from manufacture or sales conducted outside this state, e.g., manufacture in Minnesota, sale in New York. Washington also attributes none of the income of any of NCC's subsidiaries or affiliates to NCC, itself, either on the basis of a unitary business, as was the case in *Container Corp.*, 463 U.S. 159 (1983), or on any other basis.

In *Standard Pressed Steel Co.*, 419 U.S. 560 (1975) the Court ruled that the selling B&O tax was "apportioned exactly to the activities taxed." 419 U.S. at 564. The Court cited this quotation from *Standard Pressed Steel* with approval in *Moorman Manufacturing Co. v. Bair*, 437 U.S. 267, 280 (1978).

The Court has also approved imposition of a manufacturing tax measured by the selling price of the goods. *American Manufacturing Co. v. St. Louis*, 250 U.S. 459, 462-463 (1919) and *Freeman v. Hewitt*, 329 U.S. 249, 258 (1946).

In summary, NCC has failed to establish the existence of a multiple tax burden. Washington's selling and manufacturing B&O taxes are fairly apportioned. The Court's decisions in *General Motors* and *Standard Pressed Steel* are dispositive of NCC's apportionment claim. Thus, the decision below is clearly correct and does not present a substantial federal question.

CONCLUSION

For the reasons given above, this appeal should be dismissed or, in the alternative, the judgment should be affirmed.

DATED this 3rd day of July, 1986.

Respectfully submitted,

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Supreme Court, U.S.
F I L E D
JUL 11 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-2006

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OCTOBER TERM, 1985

NATIONAL CAN CORPORATION, *et al.*,
Appellants,

v.

STATE OF WASHINGTON,
DEPARTMENT OF REVENUE,
Appellee.

ON APPEAL FROM THE SUPREME COURT
OF WASHINGTON

BRIEF IN OPPOSITION TO MOTION TO DISMISS OR AFFIRM

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July 11, 1986

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BRIEF IN OPPOSITION TO MOTION TO DISMISS OR AFFIRM

Appellants submit this brief in opposition to Appellee's Motion to Dismiss or Affirm ("Motion"). Pursuant to Rule 28.1, Appellants state that the only changes to their Designation of Corporate Relationships filed as Appendix G to the Jurisdictional Statement are listed in footnote 1.

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[1]The following entities now own 5% or more of Allis-Chalmers Corporation: United Banks of Colorado, Equitable Life Assurance Society and BEA Associates. The following entities are now affiliates of General Electric Company: RCA/Sharp Microelectronics, Inc.; Page America Group, Inc.; Philippine Global Communications, Inc.; Center for Advanced Television Studies; Earth Observation Satellite Co.; Lodgistix Inc.; Microelectronics and Computer Technology Corp.; Planar Systems, Inc.; Semiconductor Research Center; Hearst/ABC-RCTV; RCA/ Columbia Pictures Home Video; Screen Sport, Ltd.; RCA/Ariola Europe, Ltd.; RCA/Ariola International (Australia); RCA/Ariola International (Brazil); Record Service Benelux N.V.; RCA/Ariola International (Canada; Ariola/RCA Musik G.m.b.H.; Arbos Musicverlag Hans Gerig K.G.; Dean records Musicproductions-und-Verlagsgesell G.m.b.H; MSC Music Center Trontragervertrebs G.m.b.H.; Edizioni Musicale Acqua Azzura S.r.l.; Resolute Casa Editrice Musicale S.r.l.; RVC Corp.; RCA/ Ariola Internacional S. de R.l. de C.; Record Service Benelux B.V.; RCA S.A. (Spain); RCA/Ariola Limited (U.K.); RCA/Columbia Pictures International Video; Gaumont-Columbia Films RCA Video; Vertriebsgellschaft RCA/Columbia Pictures Video G.m.b.H. & Co., K.G.; RCA Columbia Pictures Video S.p.A.; CIC Video -RCA/Columbia Pictures Video S.R.C.; RCA/Columbia Pictures Video, U.K.; Transradio Chilena Compania de Telecommunicacones S.A.; RCA/Ariola International (New York).

I. APPELLEE'S ADMISSIONS AND CLAIMS UNDERSCORE THE SUBSTANTIAL FEDERAL QUESTIONS RAISED.

Appellee seeks to save a tax scheme that it admits "appears discriminatory" by contending that (i) taxes on manufacturing and selling activities are compensatory and (ii) the requirement of internal consistency need not be applied where the issue is discrimination. Motion at 12, 15 & 16. These contentions, right or wrong, present substantial federal questions. If they are wrong, the decision below stands in defiance of *Armco, Inc. v. Hardesty,* 467 U.S. 638 (1984). If meritorious, they nonetheless represent too radical a departure from *Armco* to be accepted without plenary consideration.

A. Appellee, Conceding That Its Tax Appears Discriminatory, Is Forced To Rely On The Compensatory Tax Theory Rejected in *Armco.*

Appellee concedes that "[u]nder the first part of the *Armco* opinion the manufacturing B&O tax appears discriminatory." Motion at 12. Appellee was unable to avoid the concession because the manufacturing tax is imposed on manufacturers whose sales cross state lines — while similarly situated manufacturers who sell within the state are exempt.

The concession of facial discrimination has forced Appellee to adopt a "compensatory tax" theory to save its scheme — despite the explicit rejection of that theory in *Armco*. Motion at 12-15. *Armco* rejected a compensatory tax theory because "manufacturing and wholesaling are not 'substantially equivalent events.' " 467 U.S. at 643. Ignoring those taxable events, which this Court found pivotal, Appellee has diverted the focus to provisions of its scheme. It argues that its tax is "materially different" from the tax invalidated by *Armco.* Motion at 5.

If Appellee's "materially different" premise were correct, a substantial question nonetheless exists as to whether taxes on events that *Armco* found "not substantially equivalent" can

be made "compensatory" simply by different tax provisions. Plenary consideration would be required to repudiate *Armco's* focus on the events taxed. More likely, a substantial question is presented for the reason that Appellee's compensatory tax contention is wrong and in conflict with *Armco*. The premise on which the contention is based — that Washington's scheme is "materially different" than West Virginia's — has been impeached by Appellee's earlier admission that the two schemes are "very similar." *See* Brief of the State of Washington as Amicus Curiae in *Armco* at 1.

Moreover, Appellee's effort to establish that its taxes are "compensatory" is futile. The consequence is simply that the taxes would be considered together in testing for discrimination. This will avail Appellee nothing. For, as the *Armco* Court concluded in the course of considering the compensatory argument:

> Moreover, when the two taxes are considered together, discrimination against interstate commerce persists. If Ohio or any of the other 48 States imposes a like tax on its manufacturers — which they have every right to do — then *Armco* and others from out of state will pay both a manufacturing tax and a wholesaling tax while sellers resident in West Virginia will pay only the manufacturing tax. . . .

463 U.S. at 644. The court subsequently labeled this test for discrimination as a requirement of "internal consistency." *Id.*

Thus, while it is most likely that Appellee's compensatory contention is wrong, it presents a question for plenary consideration in all events. The plain fact is that *Armco* rejected the compensatory theory on which the decision below rests.

B. Appellee's Tacit Admission That Its Tax Lacks Internal Consistency, Coupled With Its Denial That the Requirement Applies Here, Creates An Unavoidable Conflict With *Armco*.

Appellee does not deny that its tax lacks internal consistency. It tacitly admits the lack by its contention that its taxes are

not subject to the requirement[2] which the Court confirmed in *Armco*:

> [T]hat a tax must have 'what might be called internal consistency — that is, the [tax] must be such that, if applied by every jurisdiction,' there would be no impermissible interference with free trade. . . .

467 U.S. at 644.

Rather, Appellee challenges application of an internal consistency test in the context of deciding whether a tax discriminates against interstate commerce.[3] But that is precisely the context in which this Court tested West Virginia's tax scheme for internal consistency in *Armco*. Again, whether right or wrong, Appellee's assertion is too great a departure from *Armco* to accept without plenary consideration.

II. APPELLEE ERRS IN ASSERTING THAT ITS TAXES ARE COMPENSATORY BECAUSE INTERSTATE AND LOCAL BUSINESS PAY THE SAME AMOUNT OF TAX.

Appellee errs in claiming that its taxes result in equal burdens on local and interstate commerce.[4] *See* Motion at 16. Appellee's limited illustration does not mention, for example, that a Washington manufacturer such as National Can, selling $1,000 of product out-of-state, pays a manufacturing tax of $4.40 — but a Washington manufacturer selling the same $1,000 of goods locally pays *no* tax (i.e., *zero*) on

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[2]Motion at 16-21. Appellee concludes:

> [T]his Court should decide the question of whether an internally inconsistent tax system is *per se* discriminatory . . . only in a case in which an actual doubling up can be shown.

Id. at 21 Appellee has previously made its admission explicitly. *See* Brief of the State of Washington as Amicus Curiae at 18, *Armco*.

[3]Appellee does not deny that the internal consistency requirement must be met where apportionment is the issue. *See Container Corp. of America v. Franchise Tax Board*, 463 U.S. 159, 169 (1983). That issue is present here: "Washington's lack of fair apportionment is also challenged by the present appeal." J.S. 7 n.3.

[4]The error in the claim is confirmed by an earlier decision of the court below. *Fibreboard Paper Products Corp. v. State*, 66 Wash.2d 87, 401 P.2d 623 (1965). Fibreboard paid two Washington taxes (on both its in-state manufacturing and selling), instead of the one that would be paid by local commerce, precisely because its products crossed state lines.

the same manufacturing activity. In addition, when National Can sells in Washington $1,000 of goods manufactured out-of-state, it pays a selling tax of $4.40. The result is a tax of $8.80 on $2,000 of activities. A similarly situated intrastate business — manufacturing and selling $1,000 of goods in Washington — also engages in $1,000 of manufacturing and $1,000 of selling ($2,000 of activities), but pays a tax of only $4.40. Thus, National Can performs precisely the *same quantum* of the *same activities* as a wholly local business, *but pays twice the tax.*[5] Washington admits that it is discrimination when interstate commerce pays a higher tax than local business. Motion at 7-8.[6]

III. APPELLEE ERRS IN CLAIMING MISREPRESENTATION OF FACTS—THERE BEING NO FACTUAL DISPUTES ON THIS STIPULATED RECORD.

Appellants are here on a *stipulated* record. (See stipulations of facts in the Jurisdictional Statement, App. H, I, & J; together with pertinent statutes, App. E.) There are no disputed facts, only issues of law. Nonetheless, Appellee claims that "NCC misrepresents the facts" because Appellants characterize the challenged taxes as unapportioned. *See* Motion at 21-23. That is the precise characterization

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[5]Put otherwise, local business gets two activities in Washington for the price of one. Any householder knows that a bargain can take the form of two articles for the price of one as well as a lower price for one article. The "two-for-one deal" (as Appellee termed it before the court below) that Washington gives local business is a difference in form, not substance.

[6]Appellee's argument that its manufacturing and selling taxes are compensatory is untenable for other reasons as well. The characteristics of Washington's taxes that supposedly make its scheme "materially different" from West Virginia's (Motion at 5-6) actually *aggravate* the constitutional defects inherent in Appellee's scheme. Wast Virginia's manufacturing tax was apportioned. Washington's is not. Motion at 5-6. The difference in West Virginia's tax rates favored interstate commerce. As *amici* COST and 25 other taxpayers have pointed out, to the extent that Washington's rates are equal, they are less favorable to interstate commerce than West Virginia's. *See* Brief of *Amici Curiae* Amcord, Inc., *et al.* in Support of the Jurisdictional Statement at 7-8; Brief of the Committee on State Taxation of the Council of State Chambers of Commerce as *Amicus Curiae* in Support of Appellant's Jurisdictional Statement at 8 & n.l.

given Washington's tax in the decision chiefly relied upon by Appellee. *General Motors Corp. v. Washington,* 377 U.S. 436 (1964) (characterizing Washington's wholesaling tax as "unapportioned and . . . therefore, suspect." *Id.* at 448).[7]

Appellee makes a like error (in claiming "misrepresentation") by attacking Appellants' observation that actual multiple taxation is present here. *See* Motion at 21-22. The statement was based on stipulated facts that were quoted verbatim in the Jurisdictional Statement (App. H, I & J).[8] Appellee's argument that multiple taxation cannot exist because Washington's tax is measured by gross receipts, while "NCC pays taxes measured by net income (gross income minus deductions) in other states" (Motion at 22) exalts formalism over economic substance.

CONCLUSION

For the foregoing reasons, as well as the reasons stated by *amici,* Council of State Chambers of Commerce and 25 other

[7]Washington's wholesaling tax is measured by 100% of Appellant's gross receipts from customers who are in Washington, even though "[i]n order to sell . . . products in Washington . . . NCC maintains . . . facilities in states other than Washington, and employs many people outside the state . . . ." J.S., App. I-2, ¶ 5. Therefore, the challenged taxes are unapportioned. Washington's manufacturing tax is likewise unapportioned. It was measured by Appellants' gross sales in other states of products manufactured in Washington. RCW 82.04.240 & RCW 82.04.450; J.S., App. E-2, E-8 & I-4, ¶ 14.

[8]For example, the parties have stipulated that "NCC pays taxes to other jurisdictions on income derived in those locations from the sale of products manufactured in Washington" and that 'NCC's gross proceeds from the same goods are also used by Washington as the measure of its manufacturing tax on NCC." J.S., App. I-3, ¶ 14. National Can also "pays taxes to other jurisdictions on income derived from its sales of products in Washington. . . . NCC's gross proceeds from the same goods are also used by Washington as the measure of its wholesaling tax on NCC. . . ." J.S., App. I-4, ¶ 15.

interstate taxpayers, the Motion to Dismiss or Affirm should be denied and the Court should note probable jurisdiction.

Dated: July 11, 1986.

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Supreme Court, U.S.
FILED
JUL 3 1986
JOSEPH F. SPANIOL, JR.
CLERK

(3)

No. 85-2006

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

NATIONAL CAN CORPORATION, *et al.*,
Appellant,

v.

STATE OF WASHINGTON,
DEPARTMENT OF REVENUE,
Appellee.

On Appeal from the Supreme Court of the State of Washington

BRIEF OF THE COMMITTEE ON STATE TAXATION OF THE COUNCIL OF STATE CHAMBERS OF COMMERCE AS *AMICUS CURIAE IN* SUPPORT OF APPELLANT'S JURISDICTIONAL STATEMENT

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IN THE

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BRIEF OF THE COMMITTEE ON STATE TAXATION OF THE COUNCIL OF STATE CHAMBERS OF COMMERCE AS *AMICUS CURIAE* IN SUPPORT OF APPELLANT'S JURISDICTIONAL STATEMENT

INTRODUCTORY STATEMENT

This brief is submitted by the Committee on State Taxation of the Council of State Chambers of Commerce as *amicus curiae* in support of the Jurisdictional Statement in the above-captioned case. Written consents of Appellant and Appellee have been obtained and are attached herewith.

OPINIONS BELOW

The Opinion of the Supreme Court of the State of Washington is reported at 105 Wash.2d 327, 717 P.2d 128 (1986); the Memorandum Opinion entered on June 28, 1985 and the Judgment entered on July 19, 1985 of the Superior Court of the State of Washington for Thurston County are not reported.

INTEREST OF AMICUS CURIAE

The Council of State Chambers of Commerce (COUNCIL), organized in 1932, consists of 40 Chambers of Commerce. The Committee on State Taxation (COST), one of the three advisory committees of the COUNCIL, consists of 242 corporate members which conduct a substantial portion of the interstate commerce of United States taxpayers. One of COST's principal activities has been to work with the states and others toward developing fair and equitable standards of state taxation.

Member companies of COST are representative of that part of the Nation's business sector which is most directly affected by state taxation of interstate operations. COST is, therefore, vitally interested in cases such as this one which present issues significantly affecting state and local taxation of interstate commerce.

Member companies of COST conduct business in Washington, West Virginia and Indiana, and in many local taxing jurisdictions, such as Los Angeles and Philadelphia—all of which have gross receipts tax systems. This Court in *Armco, Inc. v. Hardesty*, 467 U.S. 638 (1984), made clear that, in determining the validity of a state's gross receipts tax under the Com-

merce Clause, the principle of "internal consistency" applies. Under this rule, a state tax must have an internal consistency such that, if the challenged tax were applied by every jurisdiction, there would be no impermissible interference with interstate commerce.

Washington's gross receipts tax at issue in this case is the mirror image of the West Virginia taxing system declared unconstitutional in the *Armco* case. Like West Virginia, Washington imposes a gross receipts tax on the privilege of manufacturing within the state. Wash. Rev. Code §82.04.240. Similarly, Washington also imposes a gross receipts tax on companies engaged in the business of selling at wholesale and at retail. Wash. Rev. Code §§82.04.270 & 82.04.250. The Washington "multiple activities" exemption is the reverse of that found in the West Virginia tax scheme, exempting wholly intrastate businesses from the manufacturing tax instead of the selling tax. Washington manufacturer-sellers, who are taxed as wholesalers or retailers, are exempt from taxation as manufacturers. Wash. Rev. Code §82.04.440.

The discriminatory effect in this case is identical to that found by the Court in *Armco*. Both gross receipts tax systems lack internal consistency. If the precise tax scheme of each state were projected into other states, as was shown in *Armco*, interstate manufacturer-wholesalers would be subjected to two gross receipts taxes while wholly intrastate manufacturer-wholesalers are assured of being subjected to only one such tax. The West Virginia tax system invalidated in *Armco* and the Washington taxing scheme here at issue both discriminate against interstate commerce in favor of wholly local, intrastate commerce. If the Washington Supreme Court had applied the

"internal consistency" test prescribed by the Court in *Armco*, it would have been equally clear that the Washington gross receipts tax scheme is also discriminatory under the Commerce Clause. The Washington Supreme Court, however, held that the Washington tax does not discriminate against interstate commerce, choosing to disregard the Court's decision in *Armco* as controlling precedent and relying instead on earlier cases in which the state's gross receipts tax withstood various commerce clause challenges because it was "unable to find . . . a command in the *Armco* decision" to "disregard earlier decisions not overruled." 105 Wash. 2d at 332.

Appellant interstate businesses in this "test case" are representative of more than 100 taxpayers engaging in interstate commerce who filed substantially similar actions in reliance upon the Court's decision in *Armco*. At issue in all these cases is the substantial question of whether Washington's application of its Business and Occupation Tax, a gross receipts tax functionally indistinguishable from the West Virginia tax invalidated in *Armco* because it subjected interstate commerce to an unfair burden of multiple taxation not borne by local commerce, impermissibly discriminates against interstate commerce.

The instant case presents this Court with the opportunity to reaffirm the applicability to a state's gross receipts tax, as enunciated in *Armco*, of the "internal consistency" test for establishing constitutionally impermissible multiple taxation burdens upon interstate commerce. Such guidance by the Court is needed to assure a reasonably consistent and fair system of taxation throughout the nation which will (1) allow each state to receive its just share of the total

tax contribution of the nation's business sector, (2) prevent inequity and (3) protect the Constitutional rights of interstate corporate taxpayers.

SUMMARY OF ARGUMENT

A state's application of a gross receipts tax in a manner which subjects an interstate manufacturer-seller to multiple taxation not borne by a local wholly intrastate competitor constitutes an impermissible discrimination against interstate commerce in violation of the Commerce Clause of the United States Constitution.

ARGUMENT

In *Armco, Inc. v. Hardesty*, 467 U.S. 638 (1984), this Court held that West Virginia's wholesale gross receipts tax, from which local manufacturers were exempt, unconstitutionally discriminated against interstate commerce notwithstanding that local manufacturers making sales in the state were subject to a much higher manufacturing gross receipts tax. The West Virginia tax was found to be facially discriminatory because two companies selling tangible property at wholesale in West Virginia would be treated differently depending on whether the taxpayer conducted manufacturing in the state or out of it. The discriminatory effect on interstate commerce in favor of wholly local intrastate commerce was further demonstrated when the state's precise tax system was projected into other states:

> "If Ohio or any of the other 48 States imposes a like tax on its manufacturers—which they have every right to do—then Armco and others from

> out of state will pay both a manufacturing tax and a wholesale tax while sellers resident in West Virginia will pay only the manufacturing tax." 467 U.S. at 644.

This Court in *Armco* specifically rejected the view that actual discrimination against interstate commerce must be shown and adopted the principle of "internal consistency" in determining the validity of a state's gross receipts tax under the Commerce Clause:

> "Appellee suggests that we should require Armco to prove actual discriminatory impact on it by pointing to a State that imposes a manufacturing tax that results in a total burden higher than that imposed on Armco's competitors in West Virginia. This is not the test. In *Container Corp. of America v. Franchise Tax Board*, 463 U.S. 159, 169 (1983), the Court noted that a tax must have 'what might be called internal consistency—that is the [tax] must be such that, if applied by every jurisdiction,' there would be no impermissible interference with free trade. In that case, the Court was discussing the requirement that a tax be fairly apportioned to reflect the business conducted in the State. A similar rule applies where the allegation is that a tax on its face discriminates against interstate commerce." 467 U.S. at 644.

Any other rule, the Court noted, would mean that the constitutionality of the tax would depend on the "shifting complexities" or the "vagaries" of the tax laws of the other states having nexus to tax the activities in question. *Id.* at 645. *Mobil Oil Corp. v. Commissioner of Taxes*, 445 U.S. 425, 444 (1980); *Freeman v. Hewit*, 329 U.S. 249, 256 (1946).

As the stipulated facts in the record of this case show, the gross receipts tax imposed by the State of Washington fails to meet the "internal consistency" test of *Armco*. If the Washington tax system were in effect in other jurisdictions, companies engaging in interstate commerce who manufacture in Washington but sell their products outside the state would be subject to both a manufacturing tax and a selling tax. The converse is also true. Out-of-state companies manufacturing goods in a state having the same taxation provisions as Washington would be subject to two taxes on interstate sales to Washington customers. The state of manufacture would exact a manufacturing tax measured by gross sales receipts and Washington would levy a tax on wholesale or retail sales to Washington residents.

This same burden of multiple taxation is not borne by wholly intrastate local competitors, both manufacturing and selling in Washington, since the Washington Business and Occupation Tax Law contains anti-double taxation provisions by granting Washington manufacturer-sellers an exemption from the manufacturing tax. The Washington gross receipts tax scheme provides wholly local intrastate businesses a tax benefit, unavailable to taxpayer companies engaged in interstate commerce, of "two activities for the price of one" (105 Wash.2d at ___), as the court below acknowledged.

The discriminatory effect of the Washington gross receipts tax system in this case, identical to the burden on interstate commerce found unconstitutional under the "internal consistency" test of *Armco*, was acknowledged by the court below:

> "Any direct commercial advantage to local businesses inherent in Washington's B&O tax results from duplicative tax burdens; *e.g.*, the fact that strictly local businesses pay only one tax (either wholesale or manufacturing), while interstate businesses may possibly be subjected to one tax in this state and another tax at a different level of distribution in another state." 105 Wash.2d at ——.

The Washington Supreme Court, in premising its decision upholding the validity of the Washington tax under the Commerce Clause on *misstated factual differences*,[1] attempts to put aside the Court's decision in *Armco* and obscures the fact that the gross receipts tax system imposed by the State of Washington operates in precisely the same manner as the invalidated West Virginia tax with the same result of impermissible discrimination against interstate commerce.

This Court has repeatedly struck down state tax schemes which had the comparable effect of benefiting local interests, emphasizing that a fundamental principle of Commerce Clause jurisprudence mandates that "[n]o State, consistent with the Commerce Clause, may 'impose a tax which discriminates against

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[1] The court below emphasized that an essential distinction existed between the Washington and West Virginia gross receipts tax schemes because, unlike Washington which imposes identical rates on each activity, West Virginia imposed a higher tax on wholesaling (0.88%) than on manufacturing activities (0.27%). This distinction was perceived to override the obvious similarities between the two states' taxes and was the basis for the finding that the Washington selling and manufacturing taxes were complementary. In fact, West Virginia tax exacted the higher tax on its in-state manufacturers (0.88%).

interstate commerce . . . by providing a direct commercial advantage to local business.' " See *Armco, Inc. v. Hardesty*, 467 U.S. 638 (1984); *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263 (1984); *Westinghouse Electric Corp. v. Tully*, 466 U.S. 388 (1984); *Maryland v. Louisiana*, 451 U.S. 725 (1981); *Boston Stock Exchange v. State Tax Commission*, 429 U.S. 318 (1977); *see also Metropolitan Life Insurance Co. v. Ward*, ___ U.S. ___, 105 S. Ct. 1676 (1985) (Alabama's domestic preference tax law which taxed out-of-state insurance co panies at a higher rate than domestic insurance companies declared unconstitutional under the Equal Protection Clause where the effect of the discrimination found similar to the type of burden on interstate commerce prohibited by the Commerce Clause).

CONCLUSION

For the foregoing reasons, COST urges this Court to note probable jurisdiction in the present case and give plenary consideration to the Commerce Clause questions discussed in Appellant's Jurisdictional Statement.

Respectfully submitted,

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July 3, 1986

Supreme Court, U.S.
FILED
JUL 3 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-2006

IN THE
Supreme Court of the United States
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STATE OF WASHINGTON, DEPARTMENT OF REVENUE,
Appellee.

On Appeal from the Supreme Court of Washington

BRIEF OF AMICI CURIAE AMCORD, INC., ET AL. IN SUPPORT OF THE JURISDICTIONAL STATEMENT

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BRIEF OF AMICI CURIAE AMCORD, INC., ET AL. IN SUPPORT OF THE JURISDICTIONAL STATEMENT

STATEMENT OF INTEREST OF AMICI CURIAE

Amici are twenty-five corporations[1] engaged in interstate commerce, including activities in the State of Washington that subject them to the Washington business and

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[1] Amcord, Inc., Apple Computer, Inc., CPG Products Corporation, Darling Delaware Company, Inc., Del Monte Corporation, Delco Electronics Service Corporation, Ecko Products, Inc., Eddie Bauer, Inc., General Mills, Inc., General Mills Products Corporation, General Motors Corporation, Gifford-Hill Company, Inc., Glaco Corporation, Hewlett Packard Company, J.I. Case Company, Life Savers, Inc., McNeilab, Inc., Monroe Auto Equipment Company, Nabisco, Inc., Ortho Pharmaceutical, Sandvik Special Metals Corporation, Tektronix, Inc., 3M, Triangle Pacific Corporation, and York Manufacturing Company. This brief is filed with the consent of the parties.

occupation tax at issue in this appeal. Amici are directly affected by the taxes at issue here and have a direct interest in the resolution of this appeal. Like appellants, amici filed actions in the Thurston County Superior Court for refunds of business and occupation taxes paid to appellee Department of Revenue, contending that the Washington tax scheme discriminated against interstate commerce in violation of the Commerce Clause, U.S. Const. art. I, § 8. The present appeal involves fifty-three separate actions joined for decision by the Superior Court and consolidated for appeal to the Washington Supreme Court. As that latter court noted in its opinion upholding the Washington tax, "52 other substantially similar actions are pending in Thurston County Superior Court." App. to J.S. at A-1. Actions of amici are in addition to those actions, and the resolution of this appeal will have a direct effect on amici's pending refund actions.

In addition, quite apart from this particular appeal, amici have a strong interest in protecting interstate commerce from discriminatory state and local taxation. Amici engage in extensive interstate commerce, and are subject to a wide variety of taxes imposed by states and municipalities. This Court's disposition of the present appeal not only will affect amici directly, in light of their pending refund actions, but also will affect the future development of state and municipal taxation practices in a manner that will have long-term significance for the various activities engaged in by amici.

ARGUMENT

The decision of the Washington Supreme Court in this case is a direct challenge to the continued validity of this Court's recent and near-unanimous decision in *Armco Inc.* v. *Hardesty*, 467 U.S. 638 (1984). The statute at issue in the present appeal has the same economic effect on interstate commerce as the statute struck down in *Armco*, yet the Washington Supreme Court reached a result opposite that of *Armco*, based on reasoning directly at odds with the reasoning of *Armco*, in an opinion betraying evident disagreement with the clear guidance provided by *Armco*. The question before the Court in this appeal is whether the clear rules set forth in *Armco* will survive, or be replaced by the contrary analysis of the court below.

In *Armco* this Court held that a West Virginia wholesale gross receipts tax from which local manufacturers were exempt discriminated against interstate commerce in violation of the Commerce Clause. West Virginia imposed a gross receipts tax on wholesaling and a gross receipts tax on manufacturing in the State. Washington also imposes a gross receipts tax on wholesaling and a gross receipts tax on manufacturing in the State. West Virginia granted an exemption from one of its taxes for a wholly local business that paid the other; Washington also grants an exemption from one of its taxes for a wholly local business that pays the other. The only distinction is that West Virginia granted an exemption from the wholesaling tax to local manufacturers who paid the manufacturing tax, while Washington grants an exemption from the manufacturing tax to local manufacturers who pay the wholesaling tax.

In considering State efforts to prefer domestic business over interstate commerce, this Court has been careful not to rely upon "a distinction without a difference * * *." *Metropolitan Life Ins. Co.* v. *Ward*, 105 S. Ct. 1676, 1684 (1985). The essential similarity between the West Vir-

ginia and Washington tax schemes is indisputable. This similarity was recognized by appellee Department of Revenue when it argued unsuccessfully in favor of the West Virginia tax as amicus curiae in *Armco*,[2] by the Supreme Court of Washington when it first upheld the Washington tax,[3] by several Justices of this Court,[4] and by commentators.[5] The essential similarity of the West Virginia and Washington taxes is a result of the fact that Washington once had the same tax scheme as West Virginia. When the Washington Supreme Court invalidated that scheme in *Columbia Steel Co.* v. *State*, 30 Wash. 2d 658, 192 P.2d 976 (1948), the Washington legislature promptly reversed the scheme and exempted wholly local business not from the wholesaling tax but from the manufacturing tax. The question is whether such a semantic maneuver should be considered determinative in Commerce Clause analysis.

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[2] Brief of the State of Washington Department of Revenue as Amicus Curiae 1 (Washington tax "very similar to the West Virginia tax").

[3] *B.F. Goodrich Co.* v. *State*, 38 Wash. 2d 663, 668, 231 P.2d 325, 328, *cert. denied*, 342 U.S. 876 (1951) (differences between present Washington tax and previous Washington tax identical to West Virginia tax "may well be * * * verbal niceties").

[4] *General Motors Corp.* v. *State*, 377 U.S. 436, 460 (1964) (Goldberg, J., dissenting) (present Washington tax and previous Washington tax identical to West Virginia tax "have essentially the same economic effect on interstate sales * * *"). The majority in *General Motors* held that the Washington tax did not violate the Due Process Clause, but refrained from passing on the Commerce Clause issues presented by this appeal. 377 U.S. at 449. The four dissenters did reach the issues presently before the Court, and determined that the precise tax at issue in this case violated the Commerce Clause. *See id.* at 451 (Brennan, J., dissenting); 459-462 (Goldberg, J., dissenting, joined by Stewart and White, JJ.).

[5] *See* Judson & Duffy, *An Opportunity Missed*: Armco, Inc. v. Hardesty, *A Retreat from Economic Reality in Analysis of State Taxes*, 87 W. Va. L. Rev. 723, 743 (1985) (Washington tax "is the mirror image of the West Virginia scheme").

In *Armco*, this Court held that the West Virginia statute discriminated on its face against interstate commerce, violating the basic principle that "a State may not tax a transaction or incident more heavily when it crosses state lines than when it occurs entirely within the State." 467 U.S. at 642. As the Court explained:

> The tax provides that two companies selling tangible property at wholesale in West Virginia will be treated differently depending on whether the taxpayer conducts manufacturing in the State or out of it. Thus, if the property was manufactured in the State, no tax on the sale is imposed. If the property was manufactured out of the State and imported for sale, a tax * * * is imposed on the sale price. [*Id.*]

The Washington Supreme Court asserted that the Washington tax "is not facially discriminatory," App. to J.S. at A-12, but it is clear from the foregoing that this *ipse dixit* cannot be supported. The Washington tax is qualitatively no different from the West Virginia tax, save in that an exemption is provided for local manufacturing rather than local wholesaling. To paraphrase the above quotation from *Armco*, the Washington tax provides that two companies manufacturing tangible property in Washington will be treated differently depending on whether the taxpayer conducts wholesaling in the State or out of it. Thus, if the property was sold in the State, no tax on the manufacture is imposed. If the property was sold out of the State, a tax is imposed on the manufacture.

In the quotation from *Armco*, the discrimination against interstate commerce was most evident with respect to products crossing the border *into* West Virginia. Of two competing sellers in West Virginia, the interstate business paid a wholesale tax while the wholly local business did not. The reversal of the tax and the exemption in the Washington scheme means that the discrimi-

nation against interstate commerce is clearest with respect to products crossing the border *out of* Washington. Of two competing manufacturers in Washington, the interstate business pays a manufacturing tax while the wholly local business does not. Both the Washington and West Virginia statutes, on their face, tax a transaction "more heavily when it crosses state lines than when it occurs entirely within the State," 467 U.S. at 642, and the direction in which the flow of commerce is burdened is irrelevant for Commerce Clause purposes. *See H.P. Hood & Sons, Inc.* v. *Du Mond*, 336 U.S. 525, 535 (1949) ("[t]his Court consistently has rebuffed attempts of states to advance their own commercial interests by curtailing the movement of articles of commerce, *either into or out of the state* * * *") (emphasis supplied).

In any event, the Washington tax also discriminates on its face against interstate commerce flowing into the state. An out-of-state manufacturer shipping goods into Washington pays a wholesale tax on Washington sales, as does its competitor which manufactures in Washington. The Washington-based business, however, receives an exemption from the manufacturing tax, solely because it sells its goods in the local market rather than in interstate commerce. The out-of-state business receives no comparable benefit or exemption. In Washington, interstate commerce is subject to taxation from which local commerce is exempt.[6]

In *Armco*, this Court rejected the argument that the wholesaling tax could be applied only to out-of-state manufacturers as a "compensating tax" for the manufacturing tax imposed by the State on local manufacturers.

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[6] The court below recognized as much, App. to J.S. at A-15 ("local manufacturer-sellers enjoy 'two activities for the price of one' * * *"), as did appellee Department of Revenue, App. to J.S. at K (chart prepared by appellee for state legislature showing commerce crossing the border subject to "2 Taxes" and intrastate commerce subject to "1 Tax").

The Court noted that a tax on one event could only be considered as compensating for a tax on another event if the two events were substantially equivalent. 467 U.S. at 642-643. As the Court explained, "manufacturing and wholesaling are not 'substantially equivalent events' such that the heavy tax on in-state manufacturers can be said to compensate for the admittedly lighter burden placed on wholesalers from out of State." *Id.* at 643 (quoting *Maryland* v. *Louisiana*, 451 U.S. 725, 759 (1981)).

The Washington Supreme Court took the exact opposite tack. Despite this Court's unequivocal ruling that a tax on wholesaling could not be viewed as compensating for a tax on manufacturing, or vice versa, because wholesaling and manufacturing were not substantially equivalent events, the state court held that the Washington tax on wholesaling and the Washington tax on manufacturing *were* compensating taxes. It rejected as a "disturbing formalism" the view that "manufacturing and wholesaling are never 'substantially equivalent events.'" App. to J.S. at A-11. That, however, is precisely the view adopted by this Court in *Armco*.

The state court sought to justify its bold departure from this Court's ruling by focusing on the particular rates charged under the West Virginia and Washington tax schemes. In doing so, the state court committed an unfortunate factual error that appears to have tainted its legal analysis. According to the state court, the "West Virginia tax exacted substantially different tax rates on manufacturing (.27 percent) and wholesaling activities (.88 percent) * * *." App. to J.S. at A-7. The court then noted that the Washington manufacturing and wholesaling taxes were levied at "substantially identical rates." *Id.*

In fact, the Washington Supreme Court reversed the West Virginia tax rates. West Virginia imposed the higher rate—.88 percent—on local *manufacturers*, and the lower rate—.27 percent—on *sales*. *See Armco*, 467

U.S. at 640 n.2, 641 n.5, 642; *see also id.* at 647 (Rehnquist, J., dissenting). The suggestion permeating the state court opinion that the Washington tax scheme is less discriminatory than the West Virginia tax scheme, because Washington taxes local and interstate commerce at equal rates while West Virginia imposed a higher rate on interstate commerce, is thus based on a factual misconception. Contrary to the understanding of the Washington Supreme Court, West Virginia imposed the higher rate on wholly local business, and yet its tax was still struck down as discriminatory. Focusing solely on the rates, the Washington tax scheme is clearly *more* objectionable than the West Virginia tax scheme that was held in *Armco* to violate the Commerce Clause.

The Washington Supreme Court ruled that the Washington wholesaling and manufacturing taxes could be considered compensating taxes because they were levied at roughly the same rate, while the two West Virginia taxes could not be because they were imposed at different rates. App. to J.S. at A-7. Nothing in this Court's opinion in *Armco*, however, suggested that the determination of whether wholesaling and manufacturing taxes can be considered compensating is based on the specific rates being applied. This Court clearly held in *Armco* that two such taxes could not be viewed as compensating because the two incidents—wholesaling and manufacturing—were not substantially equivalent events. The Court did not suggest that the nature of wholesaling and manufacturing could somehow be transformed into substantially equivalent events if the two events were taxed at the same rate. Indeed, this Court's only pertinent observation was that the rates should be *different:* "One would expect that a manufacturing tax might be larger than a gross receipts tax since an in-state manufacturer normally benefits to a greater extent from services provided by the State than does a transient wholesaler." 467 U.S. at 643 n.6.

As an amicus in *Armco*, the Department of Revenue emphasized the similarities between the West Virginia and Washington taxes. Appearing before the Washington Supreme Court, after the West Virginia tax was struck down in *Armco*, the Department understandably changed course and argued that the taxes were different. The Department sought to justify its change of heart by asserting that "the *Armco* opinion, with its emphasis on the rates and measures of the West Virginia tax, makes the differences between the two states' taxes more significant than their similarities." App. to J.S. at A-7 n.2. Although the state court apparently accepted this assertion at face value, this Court in *Armco* clearly did not emphasize the "rates and measures" of the West Virginia tax. Indeed, this Court expressly declined to consider the effect of the particular rates imposed under West Virginia's scheme, 467 U.S. 642, 644-645, over the strong insistence of the dissent that it should do so, *id.* at 646 (Rehnquist, J., dissenting). The *Armco* opinion deemed "mistaken" the view of the West Virginia court that the taxes were not discriminatory because of the particular rates charged. 467 U.S. at 642. Focusing on particular rates would make Commerce Clause analysis hinge

> "on the shifting incidence of the varying tax laws of the various States at a particular moment. Courts are not possessed of instruments of determination so delicate as to enable them to weigh the various factors in a complicated economic setting which, as to an isolated application of a State tax, might mitigate the obvious burden generally created by a direct tax on commerce." [*Id.* at 645 n.8 (quoting *Freeman* v. *Hewit*, 329 U.S. 249, 256 (1946)).]

The particular rates might be pertinent in assessing the degree of discrimination against interstate commerce, but no combination of different rates can alter the fact that, in Washington, interstate commerce is subject to two taxes while local commerce is subject to one. *See*

App. to J.S. at K. As the Court stated in *Maryland* v. *Louisiana*, 451 U.S. at 759-760:

> It may be true that further hearings would be required to provide a precise determination of the extent of the discrimination in this case, but this is an insufficient reason for not now declaring the tax unconstitutional and eliminating the discrimination. We need not know how unequal the Tax is before concluding that it unconstitutionally discriminates.

The Washington Supreme Court sought to buttress its surprisingly bold refutation of this Court's conclusion in *Armco* that wholesaling and manufacturing taxes cannot be considered compensating taxes by asserting that the Washington tax exhibited no discriminatory impact. App. to J.S. at A-10. The court stated that "[i]n-state manufacturers selling out of state do not gain a tax advantage by shifting sales of their product to the local market." *Id.* In fact, they do. An in-state manufacturer who shifted sales to the local market could gain an exemption from the manufacturing tax he otherwise would not enjoy if he sold his goods in interstate commerce. The court also stated that "out-of-state manufacturers selling in state gain no tax advantage by moving their manufacturing operations in state." *Id.* In fact, they do. An out-of-state manufacturer selling in Washington would still pay the wholesaling tax if it moved to Washington, but it would gain an exemption from the manufacturing tax. It receives no comparable benefit so long as it remains located outside Washington.

Such discrimination against interstate commerce in favor of local commerce is the precise evil that the Commerce Clause was intended to combat. "One of the fundamental principles of Commerce Clause jurisprudence is that no State, consistent with the Commerce Clause, may 'impose a tax which discriminates against interstate commerce * * * by providing a direct commercial advantage to local business.' " *Maryland* v. *Louisiana*, 451 U.S. at

754 (quoting *Northwestern States Portland Cement Co.* v. *Minnesota*, 358 U.S. 450, 458 (1959)). The Washington tax, like the West Virginia tax struck down in *Armco*, has just such an effect.

In any event, in focusing on discriminatory impact, the state court blithely ignored the clear directive of this Court in *Armco* that proof of such impact was not necessary:

> Appellee suggests that we should require Armco to prove actual discriminatory impact on it by pointing to a State that imposes a manufacturing tax that results in a total burden higher than that imposed on Armco's competitors in West Virginia. *This is not the test.* [467 U.S. at 644 (emphasis supplied).]

The analysis in *Armco* turned not on proof of discriminatory impact but rather on application of the "internal consistency" test. Under this test the question is whether impermissible discrimination against interstate commerce would result if, hypothetically, other states imposed taxes similar to the subject taxes. As the Court explained, "[i]f Ohio or any of the other 48 States imposes a like tax on its manufacturers—which they have every right to do—then Armco and others from out of State will pay both a manufacturing tax and a wholesale tax while sellers resident in West Virginia will pay only the manufacturing tax." 467 U.S. at 644.

Since the Washington tax is the mirror image of the West Virginia tax, it is axiomatic as a matter of logic that it also cannot survive scrutiny under the "internal consistency" test. To paraphrase the Court in *Armco* once again, if any of the other states impose a like tax on its manufacturers—which they have every right to do—then a manufacturer from out of state selling goods in Washington will pay both a manufacturing tax and a wholesale tax, while sellers resident in Washington will pay only the wholesale tax. By the same token, if other states impose a like tax on wholesaling— which they have

every right to do—then manufacturers in Washington will pay both a manufacturing tax and a wholesale tax when they sell goods out of Washington, while manufacturers resident in Washington selling in Washington will pay only the wholesale tax. *See* App. to J.S. at K.

The Washington Supreme Court declined to apply the internal consistency test, for the same reasons the dissent in *Armco* urged the majority not to apply it. The *Armco* dissent criticized applying the test to gross receipts taxes, 467 U.S. at 648, and the Washington Supreme Court also noted that its application to such taxes has been questioned. App. to J.S. at A-11.

Though it ignored the clear guidance provided by this Court in *Armco*, the state court purported to rely on *Boston Stock Exchange* v. *State Tax Comm'n*, 429 U.S. 318 (1977). In that case, this Court spoke favorably in dictum of a pre-1968 New York transfer tax that "was neutral as to in-state and out-of-state sales." *Id.* at 330. Despite the Washington Supreme Court's view, the tax at issue in *Boston Stock Exchange* was not "conceptually identical" to the Washington business and occupation tax. App. to J.S. at A-10. No one could object on discrimination grounds if Washington simply imposed a wholesale tax on sales in the state or a manufacturing tax on manufacturing in the state, or both, so long as any such taxes were levied on intrastate and interstate commerce alike. Such a scheme would be "conceptually identical" to the pre-1968 tax in *Boston Stock Exchange*, but that is not Washington's tax scheme. Washington imposes both wholesaling and manufacturing taxes *and* grants an exemption from the latter *only* to wholly intrastate businesses. No such discrimination accompanied the pre-1968 tax in *Boston Stock Exchange*, and this Court emphasized in that case that such discrimination could not withstand Commerce Clause scrutiny. *See* 429 U.S. at 329.

In its near-unanimous opinion in *Armco*, this Court reaffirmed the bedrock principle of Commerce Clause

jurisprudence that " 'no State may discriminatorily tax the products manufactured or the business operations performed in any other State.' " 467 U.S. at 646 (quoting *Boston Stock Exchange*, 429 U.S. at 337). There are no meaningful differences between the West Virginia tax struck down in *Armco* and the Washington tax at issue in this appeal. The court below, in straining to uphold the Washington tax, turned the reasoning of *Armco* on its head. Where *Armco* applied the internal consistency test, the court below did not. *Compare* 467 U.S. at 644 (applying internal consistency test) *with* App. to J.S. at A-11 ("we do not read *Armco* as requiring that the 'internal consistency' requirement be applied to determine discrimination"). Where *Armco* held that manufacturing and wholesaling were not substantially equivalent events, the court below held that they were. *Compare* 467 U.S. at 643 ("manufacturing and wholesaling are not 'substantially equivalent events' ") (quoting *Maryland* v. *Louisiana*, 451 U.S. at 759) *with* App. to J.S. at A-11 ("[t]here is a disturbing formalism in [the] argument that manufacturing and wholesaling are never 'substantially equivalent events' ") *and id.* at A-8 ("the Court [in *Armco*] did not explain what it meant by 'substantially equivalent events' "). Where the Court in *Armco* held that wholesaling and manufacturing taxes could not be compensating taxes, the court below held that they were. *Compare* 467 U.S. at 642 ("gross sales tax * * * cannot be deemed a 'compensating tax' for the manufacturing tax") *with* App. to J.S. at A-9 (sales tax and manufacturing tax are compensating taxes). The state court's disagreement with *Armco* is evident throughout its opinion. For example, the court below relied extensively on commentary critical of *Armco*, *see* App. to J.S. at A-4 n.1, A-11, and viewed its task as one of reconciling *Armco* with that "scholarly commentary," *id.* at A-16.

If this Court permits the decision below to stand, state legislatures and municipalities will inevitably view this action as a departure from *Armco*. A recent study noted

that a "number of states and municipalities utilize a gross receipts tax as a major revenue source," many other states "also impose taxes which closely resemble gross receipts taxes," and "[t]his form of taxation is also growing in popularity among municipalities." Judson & Duffy, *supra*, at 726-727. *Armco* stood as a clear warning that states and municipalities using this form of unapportioned taxation may not employ it as a guise to favor local business at the expense of the free flow of interstate commerce. Any departure from *Armco* by this Court would once again present states and cities with the temptation to devise their tax schemes not simply to raise revenue but to favor their own. The history of this Court's Commerce Clause decisions demonstrates that such a temptation has proved nearly irresistible, and once a few states succumb, others feel compelled to retaliate. The end result is "the multiplication of preferential trade areas destructive of the free commerce anticipated by the Constitution." *Maryland* v. *Louisiana*, 451 U.S. at 754.

These temptations are heightened in the present era of economic readjustment, with intense competition among the states for business and the benefits it brings. It is not parochialism or spite that prompts states to discriminate against out-of-state businesses, but rather the desire to lure such businesses from their neighbors. In *Armco* this Court recognized that states compete with each other " 'for a share of interstate commerce,' " but held that " 'in the process of competition no State may discriminatorily tax the products manufactured or the business operations performed in any other State.' " 467 U.S. at 646 (quoting *Boston Stock Exchange*, 429 U.S. at 336-337). Any departure from *Armco* would channel the vigorous and healthy competition among the states from permissible areas back into the ultimately destructive area of discriminatory tax practices.

Permitting the decision of the court below to stand in the face of *Armco* would tend "to bring adjudications of

this tribunal into the same class as a restricted railroad ticket, good for this day and train only." *Smith* v. *Allwright*, 321 U.S. 649, 669 (1944) (Roberts, J., dissenting). This Court could not have intended its decision in *Armco* to be such a fleeting sport, easily circumvented by the legislative legerdemain of switching the tax and the exemption. This Court should reverse the decision below to reaffirm that the principles articulated by the eight Justices in the *Armco* majority only two years ago are of more enduring significance.[7]

CONCLUSION

For the foregoing reasons, and those set forth in the Jurisdictional Statement, this Court should note probable jurisdiction and reverse the decision below.

Respectfully submitted,

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[7] After the decision in *Armco*, the State of West Virginia petitioned for rehearing, urging that the decision be applied prospectively only, except with respect to appellant Armco itself. Petition for Rehearing, *Armco Inc.* v. *Hardesty*, 467 U.S. 638 (1984). This Court denied the petition. 105 S. Ct. 285 (1984). Disposition of amici's refund actions is being held pending resolution of the present appeal. Whatever may be the case with respect to refund actions yet to be filed, it is clear that amici are entitled to the full benefit of any decision by this Court.

Nos. 85-1963 and 85-2006

In The

Supreme Court of the United States

October Term, 1986

Supreme Court, U.S.
FILED
NOV 20 1986
JOSEPH F. SPANIOL, JR.
CLERK

TYLER PIPE INDUSTRIES, INC.,

Appellant

v.

STATE OF WASHINGTON
DEPARTMENT OF REVENUE,

Appellee.

NATIONAL CAN CORPORATION, *et al.*,

Appellants,

v.

STATE OF WASHINGTON
DEPARTMENT OF REVENUE,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF WASHINGTON

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Appeal Docketed—Case No. 85-2006, June 3, 1986
Probable Jurisdiction Noted October 6, 1986

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CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES IN CASE NO. 85-1963

1. May 20, 1981—Appellant Tyler Pipe Industries, Inc. files Complaint for Declaration of Invalidity of Tax Assessment and other relief in the Superior Court of the State of Washington for Thurston County. Docket No. 81-2-00731-4.

2. March 22, 1982—Stipulation filed by the parties that the Complaint filed in the Superior Court of the State of Washington for Thurston County is now an action for refund by the Appellant.

3. October 12, 1982—Appellant files Amended Complaint.

4. June 15, 1984—Memorandum Opinion by the Superior Court of the State of Washington for Thurston County denying Appellant's claim for refund.

5. August 8, 1984—Memorandum Opinion by the Superior Court denying Appellant's Motion for Reconsideration.

6. October 24, 1984—The Superior Court enters both Order Denying Motion for Reconsideration and Findings of Fact, Conclusions of Law, and Judgment.

7. November 9, 1984—Notice of Appeal to the Supreme Court of Washington filed.

8. March 6, 1986—The Supreme Court of the State of Washington sitting en banc affirms the Superior Court's decision denying Appellant's claim for refund. Docket No. 51110-1.

9. March 27, 1986—Supreme Court of Washington mandates case to the Superior Court of the State of Washington for Thurston County for proceedings in accordance with its decision affirming the trial court.

10. April 15, 1986—Appellant files Notice of Appeal to the Supreme Court of the United States with the Supreme Court of the State of Washington.

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR THURSTON COUNTY

NO. 81-2-00731-4

TYLER PIPE INDUSTRIES, INC.,
a Delaware corporation,
Plaintiff,

vs.

STATE OF WASHINGTON, DEPARTMENT OF REVENUE,
Defendant.

AMENDED COMPLAINT—FOR REFUND OF TAXES AND INTEREST PAID AND OTHER RELIEF

(Filed October 12, 1982)

By way of amendment to the Complaint for Declaration of Invalidity of Tax Assessment, Injunction and Other Relief previously filed herein dated May 28, 1981, and for cause of action against Defendant, Plaintiff states as follows:

1. *Notice of Appeal.* This Amended Complaint shall constitute a Notice of Appeal, if and as required by RCW Section 82.32.180, which governs tax refund actions.

2. *Plaintiff.* Plaintiff is a Delaware corporation which does not engage in business in the State of Washington, maintains no office in the State of Washington and transacts no business in the State of Washington. Plaintiff's principal office and place of business is in Tyler, Texas.

3. *Defendant.* Defendant is the Washington Department of Revenue which has assessed and collected the bus-

iness and occupation taxes with respect to which refund is sought herein.

4. *Business of Plaintiff.* Tyler Pipe owns several subsidiaries which are engaged generally in the manufacture and sale of pipe and plumbing products. In this case, the taxes for which refund is sought were assessed with respect to the gross receipts from sales in Washington of products manufactured and sold by Tyler Pipe Industries of Texas, Inc. (hereinafter referred to as "Tyler Pipe"), a Texas corporation, which maintains its principal office and place of business in Tyler, Texas and which manufactures and markets many types of plumbing pipes and fittings through separate manufacturing and sales divisions within the Plaintiff's corporate family. Neither Plaintiff nor Tyler Pipe maintain or ever have maintained an office, plant or any other place of business in the State of Washington nor is either of such companies qualified to do business in the State of Washington. Neither company has or ever has had any employees located in or acting in the State of Washington, nor has either company sent any materials or products into the State of Washington except by U.S. Mail or independent common carrier. Neither company solicits sales in the State of Washington except through instrumentalities of interstate commerce, such as advertisements in national trade magazines and occasional mailings from out of Tyler, Texas. Neither company maintains or ever had maintained any assets or inventory in the State of Washington.

Sales of Tyler Pipe products to Washington customers are, and during the audit period were, handled through two sales representatives: Ashe & Jones, Inc. and Bridgeport Sales, Ltd. The sales representatives act independently of

the Plaintiff, Tyler Pipe and each other. They are not under the supervision or control of Tyler Pipe and do not receive any marketing, administrative or financial assistance or counseling from the Plaintiff or Tyler Pipe. The sales representatives on their own solicit sales of Tyler Pipe products, and each sales representative also handles the plumbing products of various other firms and companies.

Most orders of Tyler Pipe products by Washington customers, usually wholesale plumbing or similar firms, are placed with Tyler Pipe in Texas by mail or telephone through Tyler Pipe's independent sales representatives in Seattle; some orders, however, are placed directly by the customer with Tyler Pipe. Orders are subject to the acceptance of Tyler Pipe in Texas. Neither Tyler Pipe nor Plaintiff has ever sent any personnel into the State of Washington for purposes of soliciting or accepting orders from customers. The products are shipped to the purchasing customer from Tyler, Texas by common carrier and the purchasing customer is billed by mailed invoice from Tyler, Texas. Customers' payments are made directly to Plaintiff; Plaintiff then credits the appropriate Tyler Pipe sales division. The sales representatives do not handle payments or assist in their collection. Complaints are handled directly between Tyler Pipe and the customer and are resolved over the telephone or through the mail. During the period of time at issue, neither Tyler Pipe nor Plaintiff ever sent any service personnel into the State of Washington.

Neither Tyler Pipe nor Plaintiff has ever utilized the Washington court system or other state services to collect any delinquent accounts or for any other reason than the

initiation of this present action contesting the State of Washington's taxing authority.

5. *Assessment and Payment of Tax.* The Washington Department of Revenue issued Assessment No. 071980 against Plaintiff under the Washington Business and Occupation Tax. The Assessment, which was for the period of January 1, 1976 through September 30, 1980, asserted a total tax liability with respect to the sale of products in Washington by both Tyler Pipe and a separate subsidiary of Plaintiff which manufactures and sells specialized plumbing products, Wade, Inc., in the amount of $123,159.00, including interest. After exhausting its administrative remedies and ultimately being denied preliminary injunctive relief by the Washington Supreme Court, the Plaintiff paid the full amount of the Assessment on or about March 12, 1982, which included $105,421.00 of business and occupation tax, $29,229.00 of interest, and $232.99 of court costs, for a total payment of $134,882.99. (See Exhibit A hereto.)

As indicated above, taxes were assessed with respect to sales of products not only by Tyler Pipe, but also with respect to products sold by Wade, Inc., a separate subsidiary of Plaintiff. For purposes of this action, no refund is being sought with respect to those taxes paid with respect to Wade, Inc., which represent approximately $4,531.50 of the total amount paid. Refund is, however, sought with respect to all taxes and interest allocable to sales of products by Tyler Pipe, which have been determined by Plaintiff as follows:

Tax Year	Tyler Pipe's Washington Sales	Allocable Taxes and Interest Assessed and Paid
1976	$3,374,417	$120,884.43
1977	4,012,550	23,749.58
1978	5,078,759	27,927.41
1979	5,873,029	28,985.94
1980	3,900,664	17,171.06
TOTALS	$22,239,419	$118,718.42

Plus allocable post-assessment interest of $11,633.08.

Accordingly, refund is sought herein in the total amount of $130,351.49.

6. *Violation of Laws.* The above-described taxes and interest should be refunded to Plaintiff, as hereinafter requested, for the following reasons:

6.1 The assessment of taxes herein violates the Due Process and Interstate Commerce Clauses of the United States Constitution since there is not a sufficient nexus or contact with the State of Washington to constitutionally impose the tax and since the amount of tax is not fairly related to the benefits, if any, received by Plaintiff and/or Tyler Pipe from the State of Washington.

6.2 Said assessment violates the Washington State Constitution since it deprives Plaintiff of property without due process of law.

6.3 The assessment of the taxes against Plaintiff in this case violates the Department of Revenue's own regulations purporting to define sufficient local nexus for application of the business and occupation tax in the case of sales or goods originating in other states to persons in

the State of Washington since the in-state activity of the Plaintiff and/or Tyler Pipe is not significantly associated in any way with the sales into the State of Washington under Rule 193B (WAC 458-20-193B).

6.4 Said assessment violates RCW 82.04.430(6) since such statute specifically allows a deduction for business and occupation tax purposes for amounts derived from business in the State which the State of Washington is prohibited from taxing under the United States Constitution or the laws of the United States.

6.5 The said assessment violates the Federal Interstate Income Tax Law, 15 U.S.C. § 381, et seq. (1959), which generally provides that no state shall have power to impose a net income tax on any income tax derived from within the state by any person from interstate commerce if activity of the potential taxpayer is limited, as in this case, to selling through independent sales representatives in the taxing state and certain other activities.

6.6 The Washington Business and Occupation Tax Law (RCW 82.04.220) which imposes a tax upon the gross receipts from the sale of products in the State of Washington, as applied to the Plaintiff in this case, violates the Interstate Commerce Clause and Due Process Clause of the United States Constitution and federal statutory law, specifically U.S.C. § 381.

WHEREFORE, Plaintiff prays as follows:

1. That this court order the Washington State Department of Revenue to refund the amount of $130,351.49 representing interest and taxes payed by Plaintiff as herein alleged, including interest on such amounts provided by law.

2. That Plaintiff recover costs and attorney's fees incurred herein.

3. For such other and further relief as the court deems proper in the premises.

4. That the pleading be deemed amended in conformance with the proof of the trial of this case.

DATED this 20 day of September, 1982.

CARTANO BOTZER LARSON & BIRKHOLZ

By: _____
Thomas C. McKinnon

By: _____
Thomas A. Sterken
Attorneys for Plaintiff

IN THE SUPERIOR COURT
OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF THURSTON

No. 81-2-731-4

TYLER PIPE INDUSTRIES, INC.,

Plaintiff,

vs.

STATE OF WASHINGTON,
DEPARTMENT OF REVENUE,

Defendant.

BE IT REMEMBERED that on Monday, November 21, 1983, the above-entitled and numbered cause came on for hearing before the HONORABLE CAROL A. FULLER, Judge of the Superior Court, held at the Thurston County Courthouse, Olympia, Washington.

APPEARANCES

FOR THE PLAINTIFF: MR. THOMAS C. McKINNON

FOR THE DEFENDANT: MR. JAMES R. TUTTLE
Assistant Attorney General

*(p. 2) (Defendant's Exhibits Nos. 1 through No. 44, inclusive, were marked for identification.)

The Court: The Court calls the matter of Tyler Pipe Industries, Incorporated, against the State of Washington. Present in the courtroom is counsel for the plaintiff, Tyler Pipe, Mr. McKinnon. Present also is counsel for the state, Mr. Tuttle.

The Court has had an opportunity to read the trial memoranda. I understand that there is a motion in limine at this time.

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* Transcript of proceedings has been reproduced exactly as certified, including typographical and spelling errors.

Mr. McKinnon.

Mr. McKinnon: Yes, Your Honor. Before me proceed into that, I would also like to introduce to the Court a member of the Texas Bar, Mr. Peter J. Turner, a member of the law firm of Gardere & Wynne in Dallas, Texas.

I am requesting that he be allowed to sit at the counsel table for his trial, for the limited purpose of assisting. He is not going to take place in the trial. I asked counsel, and he says there is no problem.

The Court: And the Court will authorize that he sit at counsel table.

Are you ready to proceed with the motion in limine?

Mr. McKinnon: Yes, I am, Your Honor.

The Court: Mr. McKinnon.

(p. 3) Mr. McKinnon: At this time, Your Honor, plaintiff is moving the Court for an order in limine requesting that the defendant, its attorney and all witnesses, be directed to refrain from bringing up or testifying in any manner concerning the affairs of Wade, Incorporated.

Wade, Inc. is a Virginia corporation, as indicated in the affidavit which was submitted in connection with said corporation—or with this motion. It's a separate legal entity, although a subsidiary of Tyler Pipe Industries, Inc. It is engaged in a different business than some of the other entities involved in this suit.

Specially it's engaged in manufacturing of specification drainage products, some of which are manufactured by Tyler Pipe Industries of Texas, and Tyler Pipe Plastics Company, and some of which are purchased by Wade from affiliated manufacturers.

The business and occupation taxes which were assessed against Wade are not in issue in this lawsuit. Although Type Pipe is not conceding that there is sufficient nexus to warrant the measurement of, and the imposition of said taxes, we have not included in this particular matter, or we are not seeking a refund of the taxes paid by Wade.

There were specifically $134,832.89 of tax paid, (p. 4) including the Wade figure. The Wade figure is a minimal portion of that total amount; approximately $4,300. The balance, totalling $130,010.56 were paid by Tyler Pipe for the activities of Tyler Pipe pursuant to the audit conducted by the state.

Now, the basis for this motion in limine is that it's admitted by virtue of the discovery conducted that the state is going to attempt to in effect bootstrap its argument by alleging that the activities involving Wade warrant the imposition of the tax on Tyler Pipe.

It is conceded that Wade has during the audit period, which is the years 1976 through the first nine months of 1980, maintained a small inventory in the State of Washington, which is maintained in Seattle at the offices of its independent—of an independent sales representative, Mechanical Agents, Inc., has nothing to do whatsoever with Tyler Pipe and the sale of articles manufactured by Tyler Pipe of Texas.

The legal authority for this particular motion is found in *General Motors v. Washington*, 377 U.S. 436, which we submit in effect held that each separate division of General Motors—this was a State of Washington case—that it had to be shown that there was sufficient contact or nexus for each separate division.

Also *Norton Co. v. Department of Revenue*, 340 U.S. (p. 5) But more importantly, by virtue of state law, specifically RCW 82.04.030 adopted by the department, Wade must be treated as a separate legal entity, and its activities would have no bearing on the imposition of the alleged—or the taxes against Tyler Pipe.

And I would call the Court's attention to WAC 458-20-203, which provides as follows:

> "Each separately organized corporation is a 'person' within the meaning of the law, notwithstanding its affiliation with or relation to any other corporation through stock ownership by a parent corporation by the same group of individuals."

So we have two distinct legal entities involved here, Tyler Pipe Industries and Wade, Inc. They must be treated separately. They are recognizezd in the law as separate, and distinct legal entities, and this case has nothing to do with the activities of Wade, Inc.

For these reasons I submit the motion is proper and should be granted. Thank you.

The Court: Mr. Tuttle.

Mr. Tuttle: Thank you, Your Honor.

The Court: Let me ask a question before you start.

(p. 6) Is it possible for the Court to reserve the matter of the motion in limine until the conclusion of the testimony?

And the reason I ask that is perhaps there is really not very much testimony that is going to be introduced having to do with Wade, and perhaps it would be clearer

at that time to the Court whether or not Wade is indeed a separate subdivision. I have only your representations, and, of course, what's in the affidavit as this point to go on, and after testimony I would have a great deal more perhaps.

I don't mean to burden the proceedings, though. If there is really a great deal of testimony involved, then I probably should make that ruling at the very beginning.

Mr. Tuttle: I would submit that that's the case, that you should, because I think it's going to come up again and again. We're going to have a witness from Mechanical Agents, which is the Wade representative, and it's woven through the facts of the whole case. As far as we're concerned there is a considerable relationship. These are just different corporate subsidiaries of Tyler Pipe, the taxpayer.

So I think that you really do have to address that issue at the outset.

(p. 7) The Court: At the outset.

Mr. Tuttle: I think you should rule on it now, yes.

If I might add just one thing, particularly in response to Mr. McKinnon. I have read a lot of these nexus cases, out-of-state-seller cases, and I have yet to even see one that even limits that including of evidence along the lines that is suggested. The evidence always comes in, and the court gives the appropriate weight, and considers whether or not the activities of the so-called separate entity can be separated out.

But as we have pointed out in our memorandum, once a taxpayer submits itself to a state's taxing jurisdiction,

as Tyler Pipe has done to the extent of paying taxes and not requesting a refund for its Wade sales, then it has the —the taxpayer then has the burden to disassociate that local—that conceded local activity from its other activities to show that those sales are in no way related.

There is no case that I have ever seen that says that the taxpayer can meet the burden by getting the evidence excluding at the outset. These are all very fact intensive cases. All that evidence has to come in so the court can make its decision on the basis of (p. 8) the evidence.

The Court: Mr. McKinnon, do you have anything in rebuttal?

Mr. McKinnon: Yes, with reference to the issue Your Honor raised.

You certainly would have the prerogative, and Mr. Tuttle has indicated to me all the exhibits that he intends to offer, and the great majority of them have to do with Wade, but in response to his particular points again I would submit that under the law they are separate legal entities, and they are to be treated as such, and the WAC provision clearly specifies that.

Now, what's the relevancy of the activities of Wade, and the small inventory it maintains, when that is not in issue. What is in issue are the activities of Tyler Pipe. Again I submit that it's proper. He has to show for each separate legal entity that the requisite nexus is met, and the meeting of the nexus with respect to Wade does not prove that that requisite nexus or connection is met with respect to Tyler Pipe.

What I'm afraid of, and one of the main purposes of the motion, I submit that most of his case is going to have

to do with Wade, which I submit by virtue of the authorities cited, has nothing to do with the real (p. 9) issue. That is whether Tyler Pipe has the minimal connection necessary which would warrant the imposition of the taxes, and it's going to drag this thing out longer than would be necessary.

* * *

(p. 15) The Court: Mr. McKinnon, your first witness.

Mr. McKinnon: Yes, Your Honor. Before we proceed to the witness, I would like to read into the record certain facts which were admitted as a result of a request for admission of facts submitted by plaintiff in this matter. The admitted facts are as follows:

"Plaintiff is a corporation established under the laws of Delaware. It is registered to do business in the State of Texas and maintains its principal place of business in Tyler, Texas. It is engaged in the business of selling pipe, plumbing and related products.

2. Tyler Pipe markets, sells and distributes, cast iron, pressure and plastic pipe and fittings, and sells and distributes specification drainage products. Most of Tyler Pipe's customers, including those located in the State of Washington, are wholesale plumbing or similar firms. Tyler Pipe owns several subsidiaries (p. 16) which are engaged generally in the manufacture, marketing and sale of pipe and plumbing products.

3. All sales which are the basis for the B&O taxes imposed in this case are sales of cast iron, pressure and plastic pipe and fittings which are marketed by a division of Tyler Pipe or by a wholly-owned subsidiary of Tyler

Pipe which has since been merged into Tyler Pipe and continues to exist as a separate division within Tyler Pipe.

4. The taxes for which refund is sought in this case were assessed with respect to the gross receipts from sales by Tyler Pipe to Washington customers of products manufactured by Tyler Pipe Industries of Texas, Inc., or by Tyler Plastics Company, both of which are wholly-owned subsidiaries of Tyler Pipe. Tyler Pipe Industries of Texas, Inc., produced all of the cast iron pressure pipe and fittings sold by Tyler Pipe for delivery in Washington and Tyler Pipe Plastics produced all the plastic pipe and fittings sold by Tyler Pipe for delivery in Washington. Neither Tyler Pipe of Texas, Inc. nor Tyler Plastics engaged in any marketing. sales or distribution activities."

This was admitted:

"Subject to the qualifications that the taxes for which refund is sought were 'measured by' rather than (p. 17) 'assessed with respect to' the referenced gross receipts, and subject to the further qualification that the last sentence refers to activities in Washington State.

Tyler Pipe has never utilized the court system of the State of Washington to collect any delinquent accounts or for any other purpose."

This was also admitted:

"Subject to the qualifications attendant to this lawsuit.

Tyler Pipe has no ownership or other interest in Ashe & Jones, Inc."

This was admitted:

"Subject to the qualification that the 'interest' referred to means an ownership interest.

The principal means by which the sales representative communicates with Tyler Pipe is by telephone.

The sales representative is paid solely on a commission basis according to the volume of sales of Tyler Pipe products in its geographic area. Tyler Pipe does not compensate, nor does it exercise any authority or control over, any employees or agents of the sales representative."

This was admitted:

"Subject to the qualification that the compensation and exercise of authority or control referred to in (p. 18) the second sentence mean 'direct' compensation or exercise of authority or control.

Tyler Pipe products are shipped to the purchasing customer from Tyler, Texas by common carrier or U.S. Mail. The purchasing customer is billed by Tyler Pipe by mailed invoice from Tyler, Texas. Customers' payments are made directly to Tyler Pipe."

This is admitted:

"Subject to the qualification that some Tyler Pipe products are shipped from a warehouse in Washington State."

Which, parenthetically, I'll say they are the Wade, Inc. separate corporation's products.

"All remittances from Washington customers during the audit period were mailed directly to Tyler, Texas or to

Tyler Pipe's lock box at First National Bank in Dallas, Texas.

No checks, drafts or other payments from Washington customers were sent to the sales representatives during the audit period.

Admitted—Subject to the qualification that only checks, drafts or other payments payable to Tyler Pipe are included.

The inside sales force's primary responsibility is to receive orders by telephone from customers nation- (p. 19) wide.

Once an order is accepted, it is first submitted to the data processing center of Tyler Pipe at its headquarters in Tyler, Texas. An invoice is prepared on an independent form bearing the name of 'Tyler Pipe Industries' and the company's logo, with the division name being added by the computer. The same invoice form is used for billing by all divisions."

This was admitted:

"Subject to a denial that the invoice form is an 'independent' form (whatever that means), and subject to denial of any implication that an order is necessarily accepted in Texas.

The invoice identifies Tyler Pipe Industries, Inc. as seller. No other sales documents are prepared. The original and two copies of each invoice are sent to the customer. One copy is retained and the Sales Department's file; one copy is sent to the Credit Department; one copy is sent to the sales representative. Tyler Pipe then credits the appropriate Tyler Pipe sales division."

This is admitted:

"Except for the second sentence (which is denied), and subject to the qualification that the word 'and' in the fourth sentence means 'in'."

(p. 19-a) And at this time, talking with counsel this morning, we are stipulating that the amount—exact amount of the refund sought is in the total sum of $130,010.56.

Is that correct, Mr. Tuttle?

Mr. Tuttle: Yes.

Mr. McKinnon: That is the end of the stipulation.

At this time we'll call Mr. Horan.

(p. 20) (Witness sworn.)

JAMES B. HORAN

called as a witness herein, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

By Mr. McKinnon:

Q Would you state your full name for the record, please, and spell your last name?

A James B. Horan, H-o-r-a-n.

Q What is your residence address, Mr. Horan?

A 2926 Keaton, K-e-a-t-o-n, Street, Tyler, Texas.

Q And what is your occupation?

A Senior Vice-President Marketing, Tyler Pipe Industries.

Q How long have you been employed by Tyler Pipe?

A 28 years, and a few weeks.

Q Can you just briefly give us your educational background?

A I finished through the third year in senior college.

Q And briefly relate the functions you have served at Tyler Pipe over the years.

A I have had varied job descriptions, and titles, beginning with, in 1954, when I first came with Tyler Pipe as assistant to the manager of the Tyler Specialty Company, (p. 21) a wholly owned subsidiary of Tyler Pipe Industries.

Q How long did you serve in that capacity?

A Through '56, at which time the manager resigned from the company to take other employment, and I was promoted to that position, and held the position through 1968—'58 excuse me.

Q Then what position did you assume?

A Tyler Specialty Company was dissolved, and merged into Tyler Pipe and Foundry Company at that time, and through the devices of catalogue rearrangement became catalogue sections of Tyler Pipe and Foundry Company, and I became manager of the Specification Drain Sales, Section 7—Division 7 of the Tyler Pipe and Foundry Company.

I held that position, and then included—promoted to include the Soil Pipe Division, as sales manager of Tyler Pipe and Foundry. Then held that position through 1960, at which time I was made sales manager of all sales divisions of Tyler Pipe and Foundry Company.

In 1963 I was promoted to an officer of the company as vice-president of Marketing. In 1977, December, I became senior vice-president of Marketing of Tyler Pipe Industries, which position I hold today.

Q Can you briefly tell us what your duties are as senior vice-president of Marketing?

A Well, as senior vice-president of Marketing I am challeng- (p. 22) ed with the responsibility to monitor the activities of the marketing arm of the company, and help to make decisions about the activities of that department.

Q Briefly give us a summary of the nature of Tyler Pipe's business, just exactly what does Tyler Pipe do, and the type of products that are involved.

A Tyler Pipe's products are principally used in the construction of plumbing and—let me put it differently—fresh water and waste water plumbing piping systems for domiciles, commercial buildings, office buildings, factories, plants, and so forth.

Q Are there any divisions within Tyler Pipe of Texas, or does that—just briefly describe the type of business Tyler Pipe of Texas performs.

A Well, Tyler Pipe of Texas, through its manufacturing processes, speads itself into several different divisions of the company in Texas. The Utilities Division, which manages the sale of those products peculiar to waterworks distribution. That is the fresh water side of my opening remark.

The DWV Division manages the sale of castiron and plastic drainage, waste, and vent piping and fitting products for use in the removal of waste water from domiciles,

offices and so forth. The Wade Division manufactures and distributes, rather, products auxiliary (p. 23) to plumbing piping systems.

Q Is Wade a separate corporation?

A Yes, it's a separate corporation.

Q Where is it incorporated?

A Delaware, I think. I'm not straight on that.

Q Now, are the items that are sold by the Utilities Division, and the DWV Division, manufactured by Tyler Pipe of Texas?

A Yes.

Q Okay. What does "DWV" stand for, by the way?

A It's a useful expression of drainage, waste, and vent piping systems, almost all of which vent to gravity. Whereas the Utilities Division, most of those products are under pressure while in operation.

Q Where is the manufacturing plant of Tyler Pipe of Texas located?

A It's located near Tyler, Texas.

Q And are all of the goods that are sold by the Utilities and the DWV Division manufactured in Texas?

A Yes.

Q How long has Tyler been in existence?

I want you to take into consideration any predecessor corporations, too.

A The founder of the company took control of a company called the Tyler Iron Company, in Tyler, in 1935. It

(p. 24) made things not at all required in the plumbing industry. So in 1937 it began to produce castiron soil pipe, and fittings, and auxiliary items, and offered them for sale to the plumbing trade.

Q Over the years has Tyler Pipe been involved in the manufacture and marketing of any unique type of products?

A I would think that the main marketing feature of Tyler Pipe has been over the period, its forefront activities in the unique new different types of product.

Q Can you briefly tell us about some of these products?

A In 1958 we produced the first ten feet lengths of castiron soil pipe ever made in the United States. It was very unique. It required what I call an industrial revolution, and that pipe was traditionally made by hand only in five foot lengths to suit the ability of the machinery to produce the finished product. It was sand rammed by hand once again into molds, and was a very slow process. Productivity soured.

Tyler went to Sweden and brought back a process called the Akers-Stykbruk process, where we spun material into iron metal cylinders and extracted a piece of pipe very shortly thereafter.

Q What was the significance of this particular product to the industry?

Mr. Tuttle: Your Honor, I would like to (p. 25) let the witness testify, but I don't see the relevance of this. I'll stipulate they make some good products. Why do we have to get into the description?

Mr. McKinnon: I'm just briefly asking him about some of these products for the purpose to show that in fact they are a nationwide corporation, and because of their type of products they are able to engage in the interstate marketing and sale of these products.

The whole point we're getting to is how necessary are the local sales reps. That is what it comes down to, is the key.

The Court: Objection overruled. I'll ask the court reporter to read back the last question.

(Record read.)

Q (By Mr. McKinnon) You have described the ten foot pipe. What is the significance of that to the industry of that particular product?

A Well, since the pipe is installed in various lengths, then in every case where the pipe could have been longer than five feet, it was restricted by product from all manufacturers. Tyler came on the market with a pipe that stretched out an additional five feet, and joined 12 inch, or 15 inch pipe with lead and oakum to bring forth a finished joint. Therefore we cut out many joints (p. 26) that the contractors were forced to make that they did not want to make.

Q Did that increase Tyler's sales?

A Our sales on that product, machinery, soared to require seven days of production. We sold that pipe in market places not represented by Tyler, because the desirability was such that we were contacted by telephone, mail, whatever, direct contact; please, can't I buy some of that ten foot pipe.

We took the pipe to the marketplace by the device of exhibitions, shows, contractors annual conventions, where we took a booth, so forth, to spread the word as rapidly as possible.

Q Do you have other types of products that are unique to the industry?

A Probably even equally, if not more significant, by virtue of the activity, we were able to retain the tolerance of the product, both inside and out, to the point where we could replace a lead and oakum joint with a joint made of rubber compound. That reduced the cost to the contractor, the installation cost.

I might add, as an aside, we had a two year lead on all competition on the ten foot soil pipe, and a two to three year lead on all competition on the plastic, because we sought a patent protection on the gasket, and (p. 27) all competitors stayed away from that until the patent was granted.

However, they did not have the productive capacity or control of their product dimentions to bring forth, and a compression gasket at that particular time.

Q Going now to the question of how Tyler Pipe advertises its products, and keeping in mind not only the two products you just mentioned, but other products, can you briefly describe the process that Tyler goes through?

A A very significant fact, I think is—to regress—when we moved the Tyler Specialty Company into Tyler Pipe, and produced a new catalogue, it was different and unique from the rest of the industry in that it was a loose-leaf binder, and permanently registered with all

holders, so additional incremental changes, or additions to our product line could be rapidly disseminated to all interested parties by a current updated mailing campaign.

Secondly, our advertising budget has been very larged in comparison to others, in that we have advertised in all trade magazines, some regional magazines, some what we call house—for instance, the North Carolina Heat and Cooling Contractors has a little magazine of their own that describes the activities of that organization, and from time to time we expose ourselves with (p. 28) advertisements either describing the products, or the good name of Tyler Pipe, and so forth.

Q What about—you mentioned trade fairs, and exhibitions. How does Tyler Pipe handle its advertising and marketing at such functions?

A There are, throughout the year, regularly scheduled conventions, or trade shows. Conventions usually do not have exhibits. So you go to see customers from all over a region, or the United States, but the trade shows, which, once again, are regulary scheduled, Tyler Pipe takes various booth spaces, and determines which products it wants to show at that particular show, whether or not we'll have a convention suite to entertain after hours some of our customers, and so forth.

Q Are those, the trade shows you were referring to, national in scope?

A Some of them are. Some are regional in scope, some are cities. The American Society of Plumbing Engineers has local chapters throughout the country. We have some as simple as a table top seminar, and you take

your local representation, or the home office, certain unique products, to exhibit those products to the people who attend.

Q Are the attendees at most of these meetings, do they come from a national or regional basis?

A The larger ones, yes, national; international sometimes.

(p. 29) Q Now, calling your attention to the audit period involved in this particular lawsuit, which is, I think it will be stipulated, is the years 1960 through the first nine months—or '76, excuse me, through the first nine months of '80, how were Tyler Pipe products handled in the State of Washington.

I'm just talking about Tyler Pipe products.

A Well, they were—orders were received from customers in the State of Washington at Tyler's facilities in Texas, or to its representation here in the state.

Q What was that representation in the state?

A Well, we have two representatives in the timeframe; Ashe & Jones, who handled the Utilities Division, and DWV sales, and Mechanical—I'm sorry, I have forgotten the last word.

Q Mechancial Agents?

A Mechanical Agents, who handle our Wade Division only.

Q Okay. But I'm just calling your attention to the Utilities and DWV.

They were handled by Ashe & Jones?

A Ashe & Jones.

Q For a particular territory?

A Principally the State of Washington.

Q Did they also go outside the state?

A State of Montana.

(p. 30) Q Does Tyler have any ownership interest in Ashe & Jones?

A No, sir.

Q You know by whom Ashe & Jones is owned?

A Not precisely, although I think the principals are John Ashe and Glen Jones.

Q What type of materials were provided Ashe & Jones by Tyler Pipe?

A As in marketing materials?

Q Yes.

A Well, we would have, over the years, provided them with catalogues, principally; some fliers, brochures, broadsides. Things of that nature.

Q How are those materials provided, or how are they sent?

A By mail, or parcel post.

Q You send any material—well, strike that.

Who principally are your customers, say, in the State of Washington, during the audit period, to your knowledge?

A In the divisions we're discussing here?

Q Yes.

A Well, we have two lines of customers. The Utilities Division does business with wholesale utility suppliers, and the DWV Division does likewise through wholesale plumbing supply companies.

Q You send materials to—to these types of customers that (p. 31) you just testified to?

A Yes.

Q And what type of materials would you sent to them?

A We would send to them also catalogues, brochures, broadsides, advertising cut-sheets, through our regular mailing list held in Tyler, Texas.

Q How are those items sent?

A Sent by mail, or parcel post, depending on the bulk of the product.

Q Has Tyler ever maintained, owned, operated, or rented, any type of offices in the State of Washington?

A No.

Q What about—to your knowledge, has Tyler ever advertised in the State of Washington, utilizing local TV, radio, or billboards?

A No.

Mr. Tuttle: Objection. No foundation. How would he even know?

Mr. McKinnon: Well, I think I'm entitled to ask him.

The Court: Would you like to voir dire the witness?

VOIR DIRE EXAMINATION

By Mr. Tuttle:

Q Mr. Horan, do you have knowledge each time an advertise- (p. 32) ment is placed by Tyler Pipe, and where it's placed?

A. Yes.

Q Each ad is personally run by you?

A Run by me? No.

Q I mean, is placed in front of you for review by you.

A The advertising is a yearly thing. We decide what we want to do, what trade magazines, what product, whether it's black and white, four color, whether it's one division, or another, and so forth. And I have final say, yes, and what the budget will be for the Advertising Department, so forth.

So do you review that in detail, or just put your stamp on it?

A I review it in detail.

Q You would have d-ne that for each of the years of the audit period, '76 through '80?

A Yes.

Mr. McKinnon: Vocalize your answer.

The Witness: Yes. Even down to working on the literature, working the verbage, with your advertising agency in Dallas. They would be in my office. I don't like the way that reads. Let's revise this, and strike this.

Q (By Mr. Tuttle) You review the ads as well?

A The trade magazine ads. That is the highest cost in (p. 33) advertising. Truck ads, single page ads, half page ads, quarter page ads, bleed ads.

Mr. Tuttle: Nothing further.

The Court: Mr. McKinnon.

Mr. McKinnon: Could I have the last question I asked him.

I take it you have withdrawn your objection.

Mr. Tuttle: Yes.

Mr. McKinnon: Can I have that read back, please, and if there was an answer given, have that read back.

(Record read.)

DIRECT EXAMINATION (Cont'd.)

By Mr. McKinnon:

Q Can you briefly describe the process that an order goes through involving the Utilities Division, and the DWV Division, confining the answer to the audit period here in the State of Washington?

A Upon presentation of that order at headquarters, Tyler Pipe, Tyler, Texas, the order is then analyzed for, first of all, its content, and secondly its gross weight, and then that order is transmitted to a computerized typewriter, and a set of pages are prepared. And those pages consist of such things as shipping order documents, invoicing documents, and so forth.

(p. 34) That order is then—those pages necessary to the Shipping Department are transmitted to the Ship-

ping Department with a shipping date, and the order is gathered in accordance with that shipping document, and notice is given back to the Sales Department that that order is prepared for shipment either totally, or perhaps with certain line items in a negative balance.

So if we can't find that particular product in the yard, prior to shipment, that becomes and generates a backorder, and the whole process is repeated until such time as the original order is shipped complete.

Q Does the independent sales rep have any authority to accept an order?

Mr. Tuttle: Objection. That calls for a legal conclusion. What does "accept" mean?

The Court: Rephrase your question. You might ask what their procedures are with the independent rep.

Q (By Mr. McKinnon) Can you briefly describe the procedures with the independent rep, with the placement of an order?

A Well, if the order itself suits the parameters of acceptance from Tyler Pipe, then we just simply accept the order from the representative, if he is the purveyor of that order to our headquarters, and produce the documents I have described, and ship the material.

(p. 35) I don't guess I quite understand.

Q Let me rephrase that.

Does the independent rep have authority to bind the company for an order?

A No, sir.

Mr. Tuttle: Objection. Again it calls for a legal conclusion. That authority would be stated in a document, a contract, or something else, but it calls for a legal conclusion.

The Court: The objection is sustained. You may want to simply rephrase your question.

(Plaintiff's Exhibit No. 45 was marked for identification)

Q (By Mr. McKinnon) Handing you what has been marked for identification as Plaintiff's Exhibit No. 45, would you please tell the Court what that is?

A That document has a "Guide to Ordering" headline, and followed by "Conditions of Sale."

Q Where does that document come from?

A It's a part and parcel of the catalogue distributed to one and all.

Q When you say "to one and all," do the independent sales reps receive that type of catalogue?

A Yes.

Q And would Ashe & Jones have had that catalogue?

(p. 36) A Yes.

Q During the audit period?

A Yes.

Mr. McKinnon: I'll offer 45.

The Court: Any objection?

Mr. Tuttle: Let me just ask a couple questions.

The Court: Surely.

VOIR DIRE EXAMINATION

By Mr. Tuttle:

Q This guide and the conditions of sale, this page, as such, was included in the catalogue throughout the audit period; is that correct?

A That, or one of like nature, yes. I can't say if that specific one is that ole, but one of a like nature.

Q I don't see a date on it. Do you know if there would have been any changes during the audit period?

A Not substantially.

Q What changes would there have been?

A Only—really only in graphics.

Q So, to your knowledge, say, the conditions of sale, as stated here in —Plaintiff's 45, remains substantially unchanged from 1976 through 1980?

A Yes.

Mr. Tuttle: No more questions at this (p. 37) time.

The Court: Any objection to the admission?

Mr. Tuttle: No.

The Court: What has been marked for identification as the Plaintiff's Exhibit No. 45 will be admitted into evidence.

(Plaintiff's Exhibit No. 45 was received in evidence.)

DIRECT EXAMINATION (Cont'd.)

By Mr. McKinnon:

Q Calling your attention to the fifth paragraph of Exhibit 45, under "Conditions of Sale," could you just, for the record, read what that says?

A "All orders are subject to approval of our Home Office before final acceptance. Cancellation or changes in orders are not allowed without our consent. We reserve the right to refuse, cancel or backorder items not in stock or not manufactured by us, whether or not they are shown in this catalog."

Q After a sale has received approval from Tyler, briefly describe the process which the company goes through then in shipping the particular item that has been sold.

A Once again, from this transmission to the point, Tyler, Texas, we convert that order into documents. Satisfied (p. 38) to our requirements from the documents, we gather the material, and make shipment in accordance with the customer's requirements.

Q Those destined for the State of Washington during the audit period, to your knowledge how were they shipped?

A Shipped by common carrier, principally.

Q Is there any particular reason why the products are sold by Tyler Pipe Industries of Texas to Tyler Pipe Industries?

A I'm stuck on that one. I'm sorry.

Q Is there any ICC regulation?

A Either ICC, or perhaps SEC, since we were at one time a stock company.

Q To your knowledge, during the audit period, has any Tyler employee ever resided within the State of Washington?

A No.

Q To your knowledge, during the audit period, has Tyler ever sent any employees in the state for the purpose of designing, adapting, or repairing any product?

A No.

Q To your knowledge, during the audit period, has Tyler ever sent any service personnel into the State of Washington?

Mr. Tuttle: Objection. What is meant (p. 39) by "service personnel"? We don't have a foundation as to what that term means.

The Court: Please lay a foundation.

Q (By Mr. McKinnon) Does Tyler employ service personnel who repair or handle the products once they have been sold?

A No, sir.

Q During the audit period has Tyler Pipe paid taxes imposed or assessed by the State of Texas?

A Yes, sir.

(Plaintiff's Exhibits No. 46 and No. 47, were marked for identification.)

Q (By Mr. McKinnon) Handing you what has been marked for identification as Plaintiff's Exhibit No. 46, would you please tell the Court what that document is?

A This document is headed "Tyler Pipe Industries, Incorporated, State of Texas Franchise Taxes."

Q And for what period are the franchise taxes?

A 1976 through 1980.

Q Do you have personal knowledge of how that document was prepared?

A Yes, sir.

Q How was it prepared?

A It was prepared from records maintained at Tyler Pipe Industries, Tyler, Texas, for the payment of such taxes.

(p. 40) Q And handing you what has been marked for identification as Plaintiff's Exhibit No. 47, would you please tell the Court what that is?

A This document is headed "Tyler Pipe Industries, Ad Valorem Taxes," with subheadings of "School, State and County, Junior College, and Total," for the years 1976 through 1980.

Q Do you have personal knowledge of how that document was prepared?

A Yes.

Q How was that prepared?

A In the same fashion, by the use of records maintained at our headquarters in Tyler, Texas.

Mr. McKinnon: I'll offer 46 and 47.

Mr. Tuttle: I have to object to the relevancy. Maybe Counsel can explain the relevance.

Mr. McKinnon: Well, the relevance is, Your Honor, we get to the question of the proper apportionment, and the constitutionality of the taxes, and the purpose for the offering of this document is to show during the audit period Tyler Pipe was paying taxes in Texas on the products, or on the manufacturing, et cetera, the products that were ultimately sold to the State of Washington. So that we have in effect the double taxation.

(p. 41) Again, it just goes to the question of apportionment, and the fairness of the imposition of the B&O tax by the state, when all of the manufacturing, et cetera, took place in Texas on these products, and the plaintiff was paying taxes on these products, and I certainly think it's relevant to that point.

The Court: What have been—go ahead.

Mr. Tuttle: Your Honor, there is no showing of what the franchise taxes are paid for. That is what the incidence of the tax is, whether it's a proper tax, an income tax, a license, what, No. 1. And particularly with reference to the ad valorem tax I think it's well stated that the payment of property tax in one state does not create an unconstitutional double taxation as far as payment to another state, measured by the sales, the incidence being the privilege of making sales in another state.

So there is no—unless it were shown that these were taxes paid on the privilege of making the sales in the State of Washington, or perhaps on income from those sales, this is totally irrelevant. It's just another separate tax.

* * *

(p. 42) (Plaintiff's Exhibits No. 46 and No. 47 were received in evidence.)

* * *

(p. 43) By Mr. McKinnon:

Q Mr. Horan, during the audit period did Tyler Pipe maintain any inventory in the state of Washington?

A No, sir.

Q Has Tyler Pipe compiled a comparison of sales made to customers in the State of Washington during the audit period, comparing those that came through an independent sales rep vis-a-vis those that came through a telephone?

A Have we done so?

Q Yes.

A Yes.

Mr. McKinnon: Perhaps I could ask Counsel. I know he's intending to put this in anyway. If we could have a stipulation on these figures.

(p. 44) Mr. Tuttle: That would be Defendant's Exhibit 21 you're referring to. I think. It's been marked.

Mr. McKinnon: Yes.

Q (By Mr. McKinnon) Let me just ask you at this time, Mr. Horan, there is an attachment to Exhibit—Defendant's Exhibit 21.

Are these the figures that were compiled by Tyler Pipe?

A. Yes.

Q I would just ask you at this point in time to read into the record the comparison between the two figures.

The Court: Just so I'm clear, this is the comparison of sales that came through sales reps, as compared to those that came by telephone directly to Tyler Pipe?

The Witness: Yes. The manner of transmission.

The Court: Right.

The Witness: From sales representatives in the State of Washington for the year 1976, 1,371. 1977—

Mr. Tuttle: Your Honor, excuse me. May I have voir dire for a second on this?

The Court: Surely.

(p. 45) VOIR DIRE EXAMINATION

By Mr. Tuttle:

Q Were these prepared under your own supervision?

A My own supervision, yes.

Q Do they include sales for the Wade Division, or just —

A Yes.

Q This would be all sales to all Washington customers?

A Yes.

Mr. Tuttle: Thank you, Your Honor.

The Court: Surely.

The Witness: 1978, 1,442.

The Court: All right, you identified sales representative calls, 1,371. I have 1976.

The Witness: 1977, 1,615; 1978, 1,442; 1979, 1,693; first nine months of 1980, 1,507. And the total number of all orders for delivery in Washington during the audit period, that is all orders, 1976, 1,953; 1977, 2,329; 1978, 2,522; 1979, 2531—

The Court: Would you give me that figure again.

The Witness: 2,531. First nine months of 1980, 2,103.

Mr. McKinnon: Thank you.

The Witness: Yes, sir.

(p. 46) DIRECT EXAMINATION (Cont'd.)

By Mr. McKinnon:

Q During the audit period, Mr. Horan, did Tyler Pipe employ any people who promoted sales throughout the United States?

A Yes.

Q Can you briefly describe the nature of the activities performed by these people?

A By their title, they were denoted as sales promotion representatives. That means to us that they have no responsibility to secure orders, or to secure customers. Their prime function is to display to the marketplace a product unique in Tyler Pipe's kit, if you please, and further, where the requirement for a plumbing code variation is developed by this product change, they go to seek

at the plumbing code authority level approval of the product in that particular plumbing code.

Q Were these—or where do they reside, the people you just referred to?

A Three of them reside in Tyler, because that was their home, their domicile, and one in Denver, Colorado.

Q During the audit period, in order to make a customer aware of Tyler Pipe products, or or the—and services available in the State of Washington, was it necessary to utilize an independent sales rep?

(p. 47) A No, sir.

Q Why?

A Through the device of our catalogue, and its permanence, we are able to present to the customer, real or potential, a complete description of our entire product line, and services, and policies, through that catalogue device, and subsequently promotion pieces such as brochures and the like.

Q During the audit period, in the State of Washington, was it necessary, in order to make a sale, to utilize the services of an independent rep?

A To make a sale?

Q Yes.

A Not in every case, no.

Q Why is that?

A Well, by virtue of Tyler Pipe's activities in the other 49 states, by its relationship with multi-chain supply houses, and plumbing contractors, and even archi-

tectural engineers, we are able to display our product, point out its benefits, accept orders for the products with delivery instructions, without the total requirement of a local representation.

Q During the audit period did Tyler make sales internationally?

A Yes, indeed.

(p. 48) Q Could you briefly describe the type of sale?

A It was determined that Tyler Pipe had an opportunity to move its products into the international marketplace by virtue of the development of major foreign nations, such as Saudi Arabia, and Iran at the time, Iraq, and Jordan, and so on. We developed a disc company in accordance with federal statute, and exposed our product, and offered them for sale in all markets in the world.

Q Were any independent sales reps utilized?

A No. In this case we chose to develop a direct relationship with those potential and real customers in every case, and have at this moment no representation off our shore.

* * *

CROSS EXAMINATION

By Mr. Tuttle:

Q Mr. Horan, who is David Smart?

A David Smart is an employee of Tyler Corporation, located in Dallas, Texas. I think his title is assistant treasurer.

Q Tyler Corporation, is that the same as your employer?

A It's the parent company of my employer.

Q Is it the holding company?

(p. 49) A Yes.

Q Does he — I notice that he signed the interrogatory answers, all three sets of the answers to defendant's interrogatories.

Do you have any idea how he would come to do that?

Mr. McKinnon: Well, what's the relevance of that?

The Witness: No.

Mr. McKinnon: Your Honor, he signed as an officer — he's also an officer of Tyler Pipe Industries. I just wonder where we're going on that.

Mr. Tuttle: That is what I didn't hear, that he was an officer of Tyler Pipe Industries.

The Court: The objection is overruled.

Q (By Mr. Tuttle) That is your testimony, though, he's an officer of Tyler Pipe Industries?

A Yes. I'm going to — guardedly. I don't know what title he has at Tyler Pipe Industries, frankly.

Q Would his position be above or below yours?

A It would be parallel to mine, I would assume.

Q So he would have authority to act for Tyler Pipe Industries; is that right?

A Yes.

Q Your answer was "yes"?

A Yes.

(p. 50) Q Can you describe in a little more detail what the differences are between the products of the DWV, the Drain-Waste-Vent Division, and what I understand is a subdivision of the Wade Division?

A Okay.

Mr. McKinnon: Your Honor, just for the record, and in view of the motion, I am going to have an objection. I would like it to be a continuing objection as to testimony involving anything concerning Wade on the grounds of relevancy and materiality.

The Court: All right.

* * *

(p. 61) The Court: It occurs to me it doesn't make any difference whether they operate through ten different companies, or fifty, or a hundred. That certainly would not delineate the character of an association between Tyler Pipe and Wade. I think it would almost be a given, or agreed to, that there are many subdivisions of Tyler Pipe, and Tyler Corporation, but I'm not sure that it makes any difference how many there are.

* * *

(p. 70) The Court: All right. What has been marked for identification as the Defendant's Exhibit No. 5 will be admitted into evidence.

(p. 71) Mr. Tuttle: Could the witness be handed Defendant's 42.

Q (By Mr. Tuttle) Again, Mr. Horan, would you review that.

It consists, I believe, of the actual salary job descriptions, I believe they are called, for the same positions that the duties were listed in the previous exhibit.

A Yes.

* * *

(p. 72) Q (By Mr. Tuttle) I would like to call your attention to—on Defendant's 42 to the description for the DWV and Wade regional sales manager, which, I think, is right about the third or fourth down.

Now, that has references throughout to — let's — would you read the function?

A "Function: Under general direction of the vice-president — DWV Sales, performs a combination of selling and promotion duties pertaining to Wade products."

Q Could you explain why that says "Wade products"?

A No, I cannot. It's poorly written. There is an omission here that should be included, so as to include the DWV.

Q There are a number of other references in there, too. For example, 5 says: "Assist Wade sales manager

with territory sales analysis and projections; 6, Keeps Wade sales manager advised on competitive price conditions and keeps abreast of all situations affecting sales and marketing of Wade products."

A The language should be corrected then.

Q That would include then Wade and DWV; is that correct?

A Yes.

* * *

(p. 79) Q Oh, Tyler Pipe Industries, the Delaware corporation, is the parent. Then Tyler Pipe Industries of Texas is sort of the manufacturing arm?

A Manufacturing arm of the Marketing Division, if you please. It sells products, castings, if you please, to Wade. Wade being another company.

* * *

(p. 85) Mr. Tuttle: Could the witness be handed Defendant's 15. That consists of Interrogatory No. 13, (p. 86) and the answer thereto.

Q (By Mr. Tuttle) That interrogatory asked for the Washington contracts. I think it means "contacts," or was meant to mean "contacts" — it appears that the answer interpreted it that way — but would it be your testimony today that the three companies; that is Ashe & Jones, Bridgeport Sales, and Mechanical Agents, handled all sales functions pertaining to your products during the audit period?

A During the audit period.

Q Your answer is yes?

A Yes.

• • •

(p. 93) Mr. Tuttle: If counsel's objecting to the procedure, maybe I should ask Mr. Horan to put in his own words how did you receive market information about the Washington market.

The Witness: How did I personally?

Q (By Mr. Tuttle) How did Tyler Pipe, or any subsidiary —

A Receive market information about the Washington market? Principally through its representation or its customers (p. 94) in the marketplace.

Q By "representation," you're referring to sales representatives?

A Those current representatives of our company.

Q What kind of information would that be?

A It could have to do with the general business activity in the state. It could have to do with the competitive conditions within the state in the pricing of products of like nature.

Q For example, a competitor beating you on a price?

A Yes, that sort of thing, uh-huh.

• • •

Q So I understand, you would receive information about the competitive situation, particularly prices; is that correct, and about what else, about things that are going on as far as business?

(p. 95) A Personnel changes, the sale of our customers perhaps, activity at their level. I'm talking now all the way down to contractors. They are bellwether contractors. There is always a close relationship to pipe. We watch their good health. The Boeing Company's good health and activities indicates to us what downstream our activity may consist of.

Q You get that information from the sales representative?

A Or other sources. Yes, that is one of our sources.

Q Other sources would be what?

A Our wholesale customers, and other — our sales people operating in this marketplace.

Q Other sales people?

A Yes.

Q Who would that be?

A Well, someone friendly to us, who has a non-competiting line might interject a comment along here that we may have missed.

Q What would you say your chief source of that information would be?

A Our chief source would be our representation.

* * *

(p. 103) Q Is the report — the answer indicates there is a report that is prepared monthly.

A There are reports prepared monthly, yes, quarterly and annually, accumulatively, and in dollars and cents, in tons or units of sales, and whatever fashion is of interest to the auditing person, if you please.

Q And that information is obtained from the sales representatives?

A Oh, no. I'm sorry. That's obtained internally from sales records.

Q I see. And that is all sales?

A Actual sales.

Q I heard you referring to finding out from the sales representatives about orders, prospective orders.

A That usually is in the area of forecasting events, either future or distant future events; forecasting.

Q Are the sales representatives then the source of that information, primarily?

A Yes

Q Your answer is yes?

A Yes.

Q How is that information important as far as the future? How is that important to you?

A Well, I must say it's probably subliminally computed into someone's mind as to the events that may or may not (p. 104) transpire in any given territory in any given time frame.

Q I was thinking, for example, I believe there was testimony in one of the depositions that it would perhaps

allow you to forecast how much inventory to build, adjustments in your production; would that be true?

A Well, I think I'm right in saying that our inventory positions are based on past history — immediate past history, daily past history practically, and, therefore, our forecasting for inventory position is more long time, how many tons do you think we ought to have for the upcoming quarter. That is adjusted for through — most recent history through the miracle of the computer.

* * *

(p. 146) Q Now, you testified on direct that Tyler Pipe Industries of Texas, which, I believe, is the manufacturing part of the family, sells to Tyler Pipe Industries for reasons of some sort of federal regulations. There was a leading question, I believe, to that effect, or in any case that was your testimony.

Can you explain that? Do you have any personal knowledge of what those regulations are?

A I do not.

(p. 147) Q So you wouldn't even necessarily know whether it's SEC, or ICC, or what, would you?

Would you verbalize your answer.

A No, I do not.

Q I believe you also testified that Tyler does not send any employees into the State of Washington for the purpose of adapting, designing, or repairing any products.

Was that your testimony?

A That is my testimony.

Q It's also been indicated through the answers to interrogatories that have been produced that there was some repairing of products that did occur through local vendors in the State of Washington; is that correct?

A That's correct.

Q Would it be fair to say then that any repairing that was necessary—I should say any adapting, or repairing of your products that was necessary in the State of Washington, once they were in the State of Washington, would have been done by a local vendor?

A They—

Mr. McKinnon: I'll object to the form of that question. It calls for pure speculation. He can ask him if he has any knowledge during the audit period of products repaired in the State of Washington, (p. 148) and that's been answered.

Mr. Tuttle: Let me rephrase.

Q (By Mr. Tuttle) Do you have any knowledge of any products being sent into the State or Washington, and thereafter being repaired, or adapted, by anyone other than a Washington vendor?

A I have no knowledge.

Q So, to your knowledge, any repairing or adapting that was done would have been done in the State of Washington?

The Court: Well, counsel, he just said he doesn't know, so I'm not so sure we can press him to assume something just because he doesn't know.

Mr. Tuttle: Well, I'm—well, I just—okay. Let me make sure.

Q (By Mr. Tuttle) Would there have been any other vendor outside the State of Washington to whom you would have presented a product for repair or adaption once it was in the State of Washington?

A No.

Q Now, you indicated that you did not send any employees into the State of Washington, any service personnel; was that your testimony?

A That is our testimony, yes.

Q And I think "service personnel" was defined in general (p. 149) as employees who would follow up on a sale, whatever action may be required after the delivery; is that correct?

Let me rephrase.

What do you mean by "service personnel"?

A Well, it's difficult to answer the question, because since we do not employ people that could be called by a table of organization, or job description, as service personnel. Not for Washington, not for any other state.

Q When you say you didn't send any service personnel into the state, you mean you just didn't send them into the state?

A Don't have such personnel.

• • •

(p. 160) Q (By Mr. Tuttle) What activities did you expect your sales representatives to be engaging in on your behalf (p. 161) in Washington State during the audit period?

A I suppose to remain aware of the construction activity that was taking place in the market at the time, to try to the best of their ability to keep watch over the competition, if you please, and furthermore, then, to promote the sale and use of our products through the normal channels of distribution.

Q Specifically, then, what contacts were you expecting them to make?

In other words, what types of businesses were they expected to contact on your behalf?

A A broad brush, our people are all expected to call on recognized wholesale plumbing distributors, mechanical contractors, architectural engineers, as desired and/or required for a particular purpose, plumbing inspectors, plumbing code authorities, and so forth.

Q Now, I understand that they were—what would be the purpose of calling on the wholesalers, specifically?

A To remind them, I suppose, that Tyler Pipe, and themselves, were in the marketplace and actively soliciting business, in the normal course of business.

* * *

(p. 162) Q (By Mr. Tuttle) What did you require of your wholesalers—excuse me—required of your sales representatives as far as actions in calling on wholesalers?

A Once again, as I stated before, to remind the wholesaler that Tyler Pipe was still seeking their custom, if you please, and that they, themselves, also were there to be of benefit to the wholesaler at whatever point possible.

(p. 163) Q What did you do—require them to do as far as assisting wholesalers in formulating their orders?

Mr. McKinnon: Your Honor, that's been asked and answered. He already said promotional things.

The Court: Go ahead, answer the question. You can answer the question.

The Witness: There are no such requirements.

* * *

(p. 165) Q (By Mr. Tuttle) You indicated that the sales representatives would be expected, or required, to contact contractors; is that correct?

Mr. McKinnon: Objection. He's misstating the testimony. He didn't say that they were required to do anything.

The Court: Well, he can answer that question.

The Witness: In their normal business activities, we would expect that they would do so. The requirement does not exist.

Q (By Mr. Tuttle) And why, then, would they—would the sales representatives be contacting contractors?

A To have a feel of the sense of the marketplace. Whether it's a dead marketplace, or a viable marketplace, an alive and vigorous marketplace, which contractors have work upcoming, and which do not, and so forth and so on.

Q How would that information then be—would that information be conveyed back to Tyler then?

A Not necessarily, no.

Q Would it usually be conveyed back to Tyler?

A No.

Q What use would be made of that information by the sales (p. 166) representative?

A So that he's know—I'm having to assume his purpose here in some sense—so he would know where to best spend his personal time.

Q But I believe you indicated that that was an expectation of Tyler that he be doing that.

Why would Tyler care about that?

A Well, so we'll—

Mr. McKinnon: Just a moment. I object to the form of the question, the way it's phrased.

The Court: I'm very uneasy also about this whole line of inquiry.

Now, read back the question as it was asked. I'll ask the reporter to do that.

(Record read.)

The Court: That is managing his own time. You might rephrase your question. I'll allow the question.

Q (By Mr. Tuttle) Why would Tyler be expecting a sales representative to contact the contractors to find out about how active the market is, and so forth?

* * *

(p. 167) The Witness: Our considered judgment, I suppose, that this will lead to a maintenance or improvement in market share, perhaps. It also assures that the contractor may become more aware of Tyler Pipe and its products available, and its services.

Q (By Mr. Tuttle) I believe you also indicated the sales representatives are expected by Tyler to be contacting engineers; is that correct?

A As the occasion demands.

Q What would the purpose for those contacts be?

A Generally to be a specific nature, like a project or a particular product, or service, available to the engineer whose inquiry may come triggered by advertising in trade magazines, or whatever origin.

Q As far as you're concerned, are these contacts that you have identified, that are made by the sales representative, are they essential to Tyler Pipe's maintaining or even expanding its competitive position in the Washington market?

A Not totally.

(p. 168) Q They are not essential?

A Not totally essential.

Q What do you mean by "not totally"?

A Well, you can arrive at the marketing of your goods and services through all kinds of devices.

* * *

(p. 169) During the audit period, besides sales representatives, what other means did you have for contacting wholesalers, contractors, engineers, and the other people you have identified?

A Through the media described previously. Through catalog presentation, through the advertising, and, of course, by telephone, telegram, and telex.

Q If a customer had a—and by "customer" I'm referring to—I refer to wholesalers—

Is that essentially who your customer would be?

A That is the first-line customer, yes.

Q That is who you actually invoice?

A Invoice through, and ship to or through, yes.

Q If a Washington customer had a problem with the amount of the invoice, nonconforming goods, any kind of a problem arising out of a transaction, who generally would the customer contact?

A He would general contact our local representation, if available, but many of them would escape that onerous attempt to try to find that man, and call directly to Tyler Pipe through our 800 numbers to our local tele-
(p. 170) phone sales correspondent responsible for all sales in the State of Washington in the handling of the order itself.

Q Local sales correspondent?

A I'm talking about Tyler's headquarters. They know to call headquarters, and each department, for the matter which you just laid out.

Q Was there an 800 number during the audit period?

A I believe the deposition shows that part of that—part of the audit period. Otherwise they simply called collect. We accept collect calls from our customers, and always have.

* * *

(p. 176) Q (By Mr. Tuttle) Do those—how is it determined in a particular area whether to use a factory salesman or a sales representative?

Mr. McKinnon: Can I have a continuing objection to this line of questioning, Your Honor?

The Court: Surely. Mr. Tuttle, may I suggest that the question ought to be: Why did Tyler Pipe have sales people here who were independent contractors, rather than factory representatives, because that is what we're concerned with.

Q (By Mr. Tuttle) Why did you—why did Tyler have sales representatives in Washington during the audit period instead of factory salesmen?

A During the audit period Tyler had sales representatives because Tyler estimated, perhaps, that the market would not generate enough income to Tyler, and/or its sales representative, for Tyler to have a subsidized factory salesman rather than an established local representation, with other lines, offering income to that organization.

Q You say did not offer enough of an opportunity to justify a subsidized salesman?

A Yes, to justify a salesman being not subsidized for his total cost of doing business.

(p. 177) Q Is it true that the factory salesmen, that are utilized elsewhere, are paid on a commission also?

A In part.

Q A commission based on sales?

A Yes.

Q Is there any difference, in your opinion, as far as how the sales representatives go about making sales, as opposed to how the factory salesmen make sales?

Mr. McKinnon: I won't object to that, but I take it now as a concession that this man is established as an expert witness, and can render opinion testimony. As long as that is understood on redirect.

Mr. Tuttle: Your Honor, I don't understand that. I'm just asking how they go about their jobs. What the differences are.

The Court: Well, I'm not so sure it's that important that he qualify as an expert witness. Certainly he can testify about the considerations in his own company.

Go ahead. You can answer the question, if you recall it.

The Witness: Would you repeat the question, please.

Mr. Tuttle: What is the— Would you read the question back.

(p 178) (Record read.)

The Witness: I would consider there would be no difference.

Q (By Mr. Tuttle) Do both the sales representatives and the factory salesmen have the same restrictions on their authority to accept offers, that is—

That is the question.

A Yes.

Q If you have a problem—if Tyler has a problem with a slow paying customer, slow paying wholesaler, do you have— do you utilize local sales representatives to contact that customer?

A Sometimes.

Q Would that be the usual course, usual procedure?

The Court: In the State of Washington, during the audit period.

The Witness: Not necessarily, no.

Q (By Mr. Tuttle) What other means are used then—were used in the State of Washington during the audit period?

A Conjecture would say that direct contact is made with the customer by our Credit Department.

* * *

(p. 183) DIRECT EXAMINATION

By Mr. McKinnon:

Q Would you state your full name for the record, please, and spell your last name?

A My name is Dale Meador, M-e-a-d-o-r.

(p. 184) Q What is your residence address, Mr. Meador?

A I reside at 1400 Everglades, Tyler, Texas.

Q By whom are you employed?

A Tyler Pipe Industries, Incorporated.

Q In what capacity?

A Vice-president in charge of Utility Division sales.

Q Can you just briefly give your educational background?

A I graduated from Baylor University; major in history, minor in political science.

Q Can you briefly relate your history with Tyler Pipe; when you commenced working with them, and in what capacity, from the time you started working to the present?

A Employed in 1958 as a sales clerk, Utilities Division. 1963 I became sales manager for the Utilities Division. 1977 became vice-president of Utilities Division sales.

Q Can you briefly describe what the Utilities Division is, and the type of products that are involved with the Utilities Division?

A Utilities Division sells castiron water main fittings for underground water distribution systems, and a few other related products.

Q Where are those products manufactured?

A Tyler, Texas.

Q Do you purchase any product from any outside company?

A No. A few accessories, but not the product itself.

(p. 185) Q Can you briefly relate how the Utilities Division operated within the State of Washington during the audit period in this case?

How a typical sale would be made.

A The Utilities Division, during the audit period in the State of Washington, sold their products through what we in the trade call waterwork distributors, or waterworks wholesale houses.

Q Just briefly, please tell us what a waterworks distributor and a waterworks wholesale house is?

A A waterworks distributor buys and resells products used in the—what we call the waterworks industry, which would be underground water distribution systems mainly, or pumping stations, water treatment plants, or waste water treatment plants.

Q Briefly describe how a typical order would come in, with reference to a sale in the State of Washington during the audit period.

A During the audit period, from the State of Washington, the order would be via a telephone call from a customer itself.

Q What would happen with the order once it's received in Tyler?

A Inside sales people that receive that order, it would be edited, coded for the computer, shipping papers

generated. Those shipping papers would be sent down to our (p. 186) Shipping Department. Based on the schedule, within a few days probably those products would be loaded via a common carrier, and transported to the State of Washington.

After the order is shipped, we would invoice it, bill the customer, and the customer would remit payment directly to the company.

Q During the audit period, did you ever visit the State of Washington?

A Yes.

Q Do your remember the date?

A I believe January, 1976.

Q For what purpose was that visit?

A Oh, generally to call on our customers, and express our thanks for the business, and generally promote the goodwill of our customers.

Q Do you recall with whom you met on that visit?

A I would say we met with, and called on all of the waterworks distributors that buy our product. Five or six different wholesale houses.

Q Did you meet with anyone from Ashe & Jones on that visit?

A Yes, I'm sure we did.

Q Other than that one visit you just related, in 1976, during the audit period, did you ever have any other (p. 187) occasion to visit the State of Washington?

This is strictly with reference to the audit period.

A Within the audit period I visited the State of Washington only once. That was that 1976 visit.

Q Do you know if there were any—or if anyone else from the Utilities Division made any visit to the State of Washington during the audit period?

A Yes.

Q Who was that?

A Gentleman by the name of Eldon Meadows.

Q What was his position?

A His title at this time is national accounts manager. His responsibility is somewhat the same as mine. He's sort of an assistant to me.

Q During the—what was the purpose of his visit to the State of Washington during the audit period?

A I think it would have been the same as mine. Generally to promote the goodwill of our customers.

Q How does the Utilities Division dispense information to its customers with reference to the products it has to sell?

A Utilities Division operates with a catalogue. That catalogue contains pricing information as well as technical information. Each customer is assigned a catalogue. It's a perpetual catalogue, and as changes occur they (p. 188) are mailed directly to that catalogue holder.

Q Are any changes that—in the catalogue, are they sent to Ashe & Jones, or in turn distributed to the customer, or sent directly to the customers?

A Those changes are sent directly to the customer.

Q What information, if any, is provided by the Utilities Division to Ashe & Jones.

I'll change that to was provided to Ashe & Jones during the audit period.

A I don't think much information would have came from us to Ashe & Jones. I think it would be the reverse. Probably some information would have come from them to us. I'm talking about marketing information. I know of no specific information that we would convey to Ashe & Jones.

Q If you did convey—

The Court: Just a moment. Am I to understand that you have these sales people out there from Ashe & Jones, and they're trying to sell your product, and you do not communciate any information to them, that it's just a one-way street from them to you?

Is that really your testimony?

The Witness: I'm sorry, I was speaking in terms of market information, Your Honor. Market information to us, is on prices to the trade, local infor- (p. 189) mation that would be of interest to us. We might have something take place nationally that we would pick up reaction here in this area.

As far as the catalogue information, the technical information, the pricing information, yes, Ashe & Jones gets a catalogue just like a customer would. We keep them abreast of what we're doing.

The Court: You're using that term in a very technical kind of way?

The Witness: Maybe I misunderstood the question.

The Court: No, I don't think you did. I think I misunderstood.

The Witness: Going back to the catalogue information, any new type of information, if we have some information that goes out to the customer, yes, they would get a copy of that information.

The Court: All right. I see. Please go ahead, Mr. McKinnon.

Q (By Mr. McKinnon) What type of information would Ashe & Jones provide the Utilities Division, or did provide the Utilities Division, during the audit period?

A Ashe & Jones would provide the Utilities Division with what we would call general market information.

Q Can you just briefly describe what type of information (p. 190) that is?

A Pricing in the—I'm talking about user prices, competitive factors that enter into the overall marketing situation, such as maybe some competitor come out with a new product. He would convey that to us. Maybe our customer's competitor's selling it at prices lower than he is. And possibly something has happened in the marketplace with regard to pricing, and they would convey that to us.

Q Was Ashe & Jones the exclusive purveyor of this type of information during the audit period, or did you get it from any other sources?

A No, we would get the same information from our customers.

Q How would you receive this information from your customers?

A Through the telephone, more than likely. Also maybe trade shows, and other areas where we would have communication with our customers outside the State of Washington.

Q Can you briefly describe what type of trade show you're referring to?

A Annually would be a national waterworks convention. It is a convention sponsored by the American Waterworks Association. There might be some, oh, smaller trade shows. Well, Waste Water and Water Equipment Associa- (p. 191) tion would sponsor a trade show of some sort. There has been some in years past where customers in this area would be at that show, and we have communication with them there.

Q What type of booth, or what would you provide at those trade shows?

A We would have a 20 foot booth, or ten foot booth, showing our products, showing anything new we might have, or generally a place to sit and discuss business.

Q During the audit period, would the—how would the Utilities Division receive an order?

Directing the question to whether you would get an order from the customer directly, or through Ashe & Jones.

Q Utilities Division receives their orders from waterworks distributors directly from that customer, or ditributor.

Q Is that true in most cases?

A Yes. In almost all cases, I would say.

(Plaintiff's Exhibit No. 49 was marked for identification.)

Q (By Mr. McKinnon) Handing you what has been marked for identification as Plaintiff's Exhibit No. 49, can you please tell the Court what that is?

A This is headed, "Tyler Pipe Industries, Inc., Number of Invoices Issued by Division." And then we have a number (p. 192) of orders transmitted by the sales representative broken down into two different categories. Those orders are transmitted by the sales representative, and those orders come directly from customers. It's laid out through the audit period of 1976 through the first nine months of 1980. It's broken down from Soil, or DWV Division, Utilities Division, and the Plastic Division. There is a total number there. And then they add the Wade Division, and then another total.

Q Was this document prepared since we were in court here this past week?

A Correct.

Q By whom was it prepared?

A It was prepared by our Accounting Division, based on my instructions.

Q Was it prepared in the general course of business of the Accounting Division based on the records that they have?

A Yes.

Mr. McKinnon: At this time I'll offer 49.

The Court: Any objection, Mr. Tuttle?

Mr. Tuttle: May I ask a couple questions?

The Court: Please go ahead.

Mr. Tuttle: You say this was prepared by the Accounting Division under your instructions.

(p. 193) Was that your testimony?

The Witness: Correct.

Mr. Tuttle: And it refers to the number of invoices issued. So that is the — that is an approximation then.

Is it the same as a sale in the State of Washington?

The Witness: Yes. An order would be received, and shipment made, then an invoice issued. So there has to be an order before you have an invoice. So the number of invoices, total invoices, would correspond exactly with the total number of orders received.

Mr. Tuttle: No further questions.

The Court: Any objection?

Mr. Tuttle: No.

The Court: What has been marked for identification as the Plaintiff's Exhibit 49 will be admitted into evidence.

(Plaintiff's Exhibit No. 49 was received in evidence.)

Q (By Mr. McKinnon) Calling your attention to Exhibit 49, just briefly tell us what that shows as to the Utilities Division, compare the sales received directly, or the sales that came through the sales rep Ashe & Jones?

The Court: Before you answer that, do (p. 194) you, Mr. McKinnon, have another copy of that document?

Mr. McKinnon: I just had two copies made. I'll get a copy made at the recess.

The Court: All right. You may have to be a little more detailed in your questions so I can follow, or maybe we can share. I think we can share this.

Mr. McKinnon: Can I have the last question, or do you remember the question, Mr. Meador?

The Witness: No. Would you mind repeating the question.

The Court: We'll have the court reporter read it back.

(Record read.)

The Witness: The exhibit shows the total number of orders received by the Utilities Division. Then it breaks down those number of orders as received directly from customers, and the number received from sales representatives. And it shows that we received none from sales representatives, and all came directly from customers.

Mr. McKinnon: That is all I have with reference to that exhibit.

The Court: All right. I'm having just a little trouble here. The reason was I couldn't read (p. 195) what was the heading there. All right.

Q (By Mr. McKinnon) Does the Utilities Division exercise any supervisory functions, or control, over Ashe & Jones and the manner in which Ashe & Jones operates its business?

A No.

Q Is the information received from Ashe & Jones necessary in order to enable the Utilities Division to make sales within the State of Washington?

A No.

Q Why is that?

A Because we have received a lot of information directly from our customers. Within the audit period we would have received this type of information from sales representatives. We would have dropped those sales representatives and changed to strictly house account. And that is — by that I mean we have no representation at all in an area within the audit period, and our market penetration was not affected seriously.

In fact one area — several areas — I think we probably increased our market penetration without any representation.

Q During the audit period, where did that occur?

A During the audit period Northern California would be a good example. I'd say the upper half of California, (p. 196) which would include the entire bay area, San Francisco and the surrounding areas.

Q Would the information that you received from California during the audit period, did that have any effect on the market in the State of Washington?

A Yes.

Q How—what type of effect?

A Our manufacturing competitor probably — our manufacturing competitor would sell — did sell at certain prices within the Northern California area, and those prices determined sales prices in the Washington area for some reason or another. It's a matter of the way you approach the market. It's a national market, as far as our competitors are concerned, and it's a national market so far as we're concerned.

Q Did you have a sales rep in Northern California during the audit period similar to Ashe & Jones?

A Yes. From 1976 — all of 1976, all of 1977. We had no representation in 1978, '79, and the first nine months of 1980.

Q Were you able to maintain your market in Northern California without the sales rep?

A Yes, we maintained our market, and actually we feel our market penetration in that area —

Q Were there any other areas in the United States during (p. 197) the audit period where you had no sales rep?

A Oh, yes. New England, New York, New Jersey, all along the Atlantic Seaboard, Michigan, parts of Ohio, parts of — I'm sorry — parts of Nevada. And, as I said — you said, "any other." I was going to include Northern California, but you did say any other areas.

In the Southeast, which would be Florida, Georgia, Alabama, the Carolinas for a portion of that time. I can't quote you exactly when.

Q Were you able to make sales in these areas without representation during the audit period?

A Yes.

Q And were they — do you have any idea of the volume of sales, say in a particular area, the New York area?

A If I understand the question, in the New York area 100 percent of the sales is without representation.

Q My question was geared to: Would this involve a substantial amount of sales?

Do you have a large market in that area?

A Oh, yes. Of the total Utilities Division sales of the entire country, I would say probably 30 to 40 percent at that time were house account sales, and that is with no sales representation.

Q How would you communicate with these people?

A We communicate directly by telephone, and the mails, of (p. 198) course. But primarily the telephone.

Q Were these the same type of customers as you had in the State of Washington during the audit period?

A Yes. These customers are what we call the waterworks distributors, or wholesale houses.

Q These waterworks distributors, and wholesalers, do they in turn make sales of the products you sell them?

A Yes, they buy our product and pass through it and sell it to the trade in that area. They also buy other waterworks related products. They distribute a complete line of product to do a given job.

For instance, they'll sell to the use, which would be maybe your local waterworks utility pipe, valves, fittings, all type of product that it take to do a complete underground waterworks system. We would only have the pipe. He provides the total package. We're only a part of that package.

It's what we mean when we say "distributor." He buys and distributes product for the waterworks industry.

Q During the audit period did you need to rely on the information provided by Ashe & Jones, or the services provided by Ashe & Jones, in order to make a sale in the State of Washington?

A We received some information from Ashe & Jones, I'm sure, but we could have done without that information. If (p. 199) that's your question, yes, we could have done without the information from Ashe & Jones.

Mr. McKinnon: That is all I have.

The Court: Well, Mr. Meador, let me be sure I understand this.

Do the other divisions of Tyler Pipe need the services of Ashe & Jones, but your particular division does not?

Is your division different from the other divisions?

The Witness: Your Honor, we pursue what we call a waterworks industry, and that is a little bit different from what previous testimony has shown you here. I'm talking about the DWV, or the Soil Pipe Division. They pursue what we call the drain, waste and vent market.

The Court: Yes.

The Witness: It's generally a different set of contractors that do the work and make the installations. It's generally a different set of wholesale houses that buy and resell, or distribute the materials. It's generally under the authority of different people.

For instance, in your city you probably have what we would call a Water Department, which would employ a water superintendent. Under his jurisdiction he would be responsible for delivering clean potable water to (p. 200) your home. He would see that there is a water main installed in the street in front of your house. He would see that that water is by either the city's own facilities, installation facilities, or through a contractor, that you get a meter put in front of your house. He would bring that water and the meter up to the property line.

From there I would say is the division between the waterworks industry and the plumbing industry. From there it would be up to you to hire you a plumber to bring the water on into your house. It would also be up to you to provide your water facilities for your house, which would again tie into the street, and into your local, in many cases, water interceptor.

The waterworks is going to provide you your clean water, and provide — take care of your waste water. By the same token, it comes into your property, back out to the street, or the collection system. That is normally up to you, and normally the plumbing industry brings you the materials it takes to put a water and plumbing system into your home.

In that respect the waterwork industry and the plumbing industry is completely different. The contractors who do the work are different.

The Court: I understand the difference (p. 201) in the products, and functions of those products, but what I'm wondering about is the sale of the products, and why do you consider your division different from the other divisions as far as your sales needs are concerned.

Why is it that you can do without Ashe & Jones, for instance, but the other divisions can't, or are you different in any way?

The Witness: As I have tried to explain to you, we're different in that we're pursuing a little bit different trade, a little bit different industry. Different people do the selling. Different people do the installation. They control what is in your area. The city water department, and what you get in the street, and how that water gets up to the property line.

Your plumbing code tells us what kind of products your going to use, and the installation procedure you're going to use.

The Court: I understand that. But why is it different to sell the products in the Utilities Division as opposed to the Wade Division products?

Why is it different? Why is the selling process different?

The Witness: Your Honor, I don't have sufficient information to speak for Wade. I'm sorry. (p. 202) I haven't been involved in Wade. I'm really not too familiar with Wade sales, or how they pursue their particular market. But the Utilities Division, as I said to you, our experience over the years has been that we probably, through the years, have had more representation than we do now, as we have changed representation in areas.

Maybe we used a representative to represent the DWV line, but we did not in waterworks. So we have less and less representation all the time in the Utilities Division. It's a matter that we did not feel that we needed that representation in the areas, and our experience has shown that we do not.

I believe you asked the question: Is this true of the other divisions also. As I say about Wade, I cannot — I cannot speak for Wade with enough information, but in the DWV Division I'd say it was very possible we could operate in an area without any representation in a given area.

The State of Washington, I think, is a good example. Many of the wholesale houses that pursue the plumbing industry, the DWV people, those are branches of national organizations wherein sales policies are set elsewhere, and the fact you had that sales rep calling on that particular branch within that given area would not (p. 203) have much to do with whether or not the sale was made. Many of the sales are made at the national level, and that is just the way things work out.

The Court: Yes, I can see that. That would be a difference all right. Let me ask you, Mr. McKinnon, do you have any questions that you would like to follow up on then before Mr. Tuttle begins to examine.

Mr. McKinnon: Well, I just have one question.

Q (By Mr. McKinnon) Are most of your contacts with the wholesalers with whom you deal made on a national, regional, or state level?

A I'd have to say in most cases they are on a national level.

Q Why is that, if you can just explain why they would be on a national rather than any other level?

The Court: Well, I can see that the contractors might very well not be local contractors, that they would be bigger projects, and perhaps the contractors would be employed more on a national basis. I can see that.

The Witness: May I comment on that?

The Court: Please go ahead.

The Witness: Why you're saying is very true. You may build a water treatment plant, and your (p. 204) contractor may be from New Jersey.

The Court: Right.

The Witness: The sale of the products that go into that water treatment plant may be made in New Jersey. They may be manufactured in Alabama. And what goes on as far as sales within the State of Washington would have nothing to do with it.

A good example is some of the problems down in the State of Mississippi. They have been having some jobs nowadays that are of such magnitude that they have no contractor large enough to make bond to do those jobs, and the contractors come from out of state, and this causes quite a bit of controversy in the state. The state would like their own contractors to do the work but the job is that large, or the contractor too small they can't do the job.

You're statement is very accurate.

The Court: Anything further?

Mr. McKinnon: Nothing further, Your Honor.

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(p. 208) CROSS EXAMINATION

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Q (By Mr. Tuttle) Just to make sure I understand your testimony, Mr. Meador, your testimony would be then that those customers that you identified, Pacific Waterworks, Grinnel, H. D. Fowler, Consolidated Supply, Waterworks Supply, and Crane Supply, would have been customers of only the Waterworks Division during the audit period, and not customers of other Tyler Pipe divisions; is that correct?

A That's correct. We say they are not customers of the other divisions of our company. I would say that by that they are not pursuing the plumbing trade, for instance, or the DWV trade.

Let me turn that around. Well, that would be correct. The waterworks distributor is going here to this particular market, and the DWV distributor's going to his market. And usually there is not much interchange. They might want to buy one stock of pipe, and I'm sure the other divisions would sell them, but, no, they are not customers of the other divisions.

• • •

(p. 224) Q. Okay. Who were your competitors as far as waterworks sales in Washington; competing manufacturers?

A I'm not sure that I know the total picture, but I think you would say goods are sold by Pacific States Castiron Pipe.

Q Excuse me.

A Pacific States Castiron Pipe, Trinity Iron and Steel Company.

Q Excuse me.

A Trinity. U. S. Pipe and Foundry Company.

Q U. S. —

A U. S. Initials "U. S." Possibly American Castiron Pipe Company.

Q Excuse me. What was that one more time?

A American Castiron Pipe Company. We have a local pro- (p. 225) ducer. I assume he's still producing. Olympic Foundry Company. We have a small foundry in the Los Angeles area called Dayton Foundry Company. We have a specialty waterworks producer, who produces related lines, in Portland, formerly known as Industrial Iron Works. I believe now they operate under the name of Western Foundry Company, in Portland, or the Portland area. And we have some import competition. I think generally that would be the size of it.

Q Do you know whether or not those competitors have sales representatives in the State of Washington?

Mr. McKinnon: I'll object on the ground of relevance. What relevance does that have to the issues at stake here, how they operate?

The Court: Mr. Tuttle.

Mr. Tuttle: Mr. Meador has testified on direct, if I understand his testimony, that it's not really necessary to their sales to have local representatives, that these sales sort of happen magically, and I think it goes very much to the credibility of that testimony whether or not there are competing manufacturers who have representatives.

The Court: Objection overruled. Go ahead, answer the question.

Mr. McKinnon: I'd like one portion of (p. 226) that statement stricken, Your Honor. I think it's a grossly improper categorization when he put in the phrase, "as if they happen magically."

The Court: Overruled. Go ahead.

The Witness: Trinity Valley Iron and Steel does not.

Q (By Mr. Tuttle) Does not have a sales representative?

A Correct. We would consider him our prime competitor in this area. The import people, I'm sure, do not. The local manufacturer, I can't tell you. Dayton Foundry Company does not.

Q Excuse me. Olympic — you're referring to Olympic when you said "the local," right?

A I said I do not know whether he does or not.

Q And Dayton, you said what?

A Dayton Foundry Company does not. And to be frank with you, I don't know about the others. I don't

know of the others having any, but I do not know that they do not.

Q But of these that you have mentioned, you're sure about those; is that correct?

A I'm sure that Trinity Valley does not have a local sales rep. I'm sure that Dayton does not. I'm sure the importers do not. Yes, the ones I have testified to, I'm sure they do not have a local sales representative.

(p. 227) Q Now, when you say they do not have any local representatives, would that include any salesmen employed by the company, as well as independent representatives?

A I'm sure they have sales people who operate in their own producing area. Whether or not those sales people came into this area, I couldn't tell you, if that's your question.

Q But you indicated that you knew about Trinity Valley, and Dayton, and the imports.

Does that mean that they — those that you know about, they did not have factory employed salesmen in Washington?

A My testimony is that — residing in the State of Washington, no. I believe your question is operating in the State of Washington. And if that meant outside sales people coming into the state, I had no knowledge of that.

* * *

(p. 237) Q Is it your preatice to seek information from your local representatives before you add a new distributor?

A Yes. If he has information that we might use, I think we would seek that information. I mean, if we felt he had information we could use, yes. There would be occassions where I think in the case of Hines, or comparable to the case of Hines, wherein the information would come elsewhere—come from elsewhere, and the information wouldn't really apply to the area until a later stage, until we pretty much decided what we wanted to do.

I don't think we really consulted Ashe & Jones in the Hines case too much, is what I'm trying to say.

Q Now, you were in Washington in May of '76; is that correct?

A I'm sorry. I can't recall. It was either January or May. I think we have testimony in the deposition which would indicate when we were here.

(p. 238) Q Was one purpose of that trip to look into adding Hines at that time?

A No, I don't think so. At the time I'm sure it was probably just incidental. At the time the Crane Company had a waterworks division in Seattle which they sold, and it would have been a branch of Crane that they sold to the Hines Company, and that occurred in 1976.

But I don't think the purpose of the trip was to discuss whether or not we would sell Hines. I don't believe we gave it any serious consideration at all at the time. The Crane Company branch was not all that important to us.

Q I'd like to call your attention to the—your deposition at Pages 94 and 95, with reference to apparently the May of '76 trip, when you were asked:

"Do you recall any of the subjects that you discussed with John Ashe on that trip?

A I'm sure we discussed the—"

Then Mr. McKinnon interrupted, and he said: "He's asking if you recall what you discussed." And your answer:

"Yes, I recall that we discussed the general market condition; and we discussed the sale of the other customer's waterworks business. And I'm sure we discussed whether or not we (p. 239) would want to sell Hinds Supply Company."

Would that accord with your recollection now?

A Yes, it was, I'm sure, mentioned that the Crane Company was selling out, and they were selling to Hinds Supply Company, but I don't think at all it was the main purpose of our trip. But I'm sure we weren't seriously considering selling Hinds Supply Company.

Q But you did discuss it with the representative at that time, right?

A Probably. My recollection is a little bit shy on 1976.

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(p. 242) Q Again calling your attention to your deposition, the question was asked—

Mr. McKinnon: What page?

Mr. Tuttle: Page 27. Actually let's begin on Page 26 and 27.

"Q What other differences, if any, are there as far as, for example, between the factory salesman and the manufacturer's representatives and how they solicit or take orders?

A I don't quite understand what you mean. In the State of Washington we would not give our independent agent as much support as we give a direct factory man in San Antonio. Distances have something to do with it.

Q In what sense do you mean support? What does that mean?

A Assistance from the office with other sales people to help them. We would look at expense involved, what does (p. 243) it take to support the guy and so forth. But your question originally, I assume, was is there any difference in the way they call on the trade, the way they solicit business.

Q Yes.

A They themselves, sole and alone, I would say very little difference. Each would walk into the customer's place and promote the sale of our products."

Would that be your testimony today as well, as far as the difference in how they call on the trade, and so forth?

A Yes, that would be my testimony.

Q That as far as they act alone, very little difference?

A Yes. I would say when they walk in sole and alone, they promote the goodwill of our customers, and thank them for the business, and see if they can't secure additional business, keep the door open for further transactions.

* * *

(p. 250) Q How does the sales representative go about keeping track of the competition?

A The waterworks distributor has a competitor who is another waterworks distributor. They each bid jobs.

They bid a total package, which would include pipe, valves, fittings, brass, all the products that—all the products required to do an underground water distribution system.

They would put together whatever they want for their particular products, and they bid on a contract to a municipality, or to a private water company, assuming the most responsible low bidder would receive the order.

If the fittings in the bid are broken out, and the competitor can see some way—maybe through a bid to a city, or maybe even a public open bid, if the distributor (p. 251) can see that the prices bid by his competitor were low enough in fact that he thought his competitor was getting a better price from my manufacturing competitor, that information would probably be conveyed to us through the telephone, or to us through our sales representative.

That is what we mean by general market conditions and pricing information.

Q Did you ever have occasions where the sales representative is called upon to handle some sort of an adjustment in a customer's account?

That is, goods arrived, they are non-conforming, of there's a question about the invoice, or something like that.

Does the sales representative become involved in those kinds of matters?

A Oh, we might ship a truck load of material, there would be one item short, and nobody would question the customer, maybe without so noting the shortage on a so-called overage and shortage bill, at the time of delivery. Maybe nobody counted, or miscounted, or something. They might relay to our sales representative they were short one

of this, or one of those. He would relay that information back to us.

Yes, he would be involved like that. Other than that, I don't know of any other situation where he would (p. 252) be involved.

Q So you're saying that is the kind of problem that would arise, that you just described; is that it?

A Well, I think anything which he might be involved in, there may be a more serious problem. Even the shortage itself might not be related to the sales representative. It may be related directly to us through the telephone.

Q Is the sales representative ever involved in investigating a slow pay account, where the customer is not timely paying for the materials?

A I don't recall any sales representative ever handling any problem of this nature for the Utility Division. It may be for other divisions, but I have no knowledge of that. No, I don't think so.

Q You're saying anywhere, or in the State of Washington?

A Well, I'm saying I know definitely that they have never been involved in anything like that for the Utilities Division for the State of Washington, and I'm talking about any sales representative, independent sales representative, has never handled anything like that for the Utilities Division anywhere in the country. Possibly a factory salesman has, but not an independent sales rep.

* * *

(p. 257) Q I believe you testified that you don't maintain any (p. 258) supervisory control over Ashe & Jones; was that your testimony?

A Correct.

Q I don't know what you mean by "supervisory control," but let me ask you this:

Has there ever been an instance where you asked Ashe & Jones to do something and they didn't do it?

A No, I don't recall an instance.

Q So it would be—would it be fair to say that they are usually cooperative and go along with your requests?

A If we had such a request, I think that they would, and I think you could say that they would be cooperative should those occasions arise.

* * *

(p. 263) REDIRECT EXAMINATION

By Mr. McKinnon:

Q Mr. Meador, you testified that you did talk to Mr. Jones (p. 264) during the audit period. Did you discuss anything other than sales in the State of Washington?

A Yes.

Q Can you give us an example. Did you discuss sales in any other areas, or states?

A Yes, we discussed conditions in Montana. We also have a situation wherein we would discuss general market conditions in British Columbia. I would discuss conditions with Ashe & Jones, general market conditions, in Alaska. And also Alberta. He had Edmonton and Calgary.

Q Were you attempting to get into the Canadian market?

A Yes, at that time we were trying seriously to break into the Canadian market. And Mr. Jones and I travelled in Canada several times, and we worked at that quite a bit.

Q You testified that you currently do not have any rep in the State of Oregon. That is just the Utilities Division?

A That is correct.

Q Does the DWR have a rep there now?

A They do.

Q You recall any instance during the audit period when Ashe & Jones rendered any assistance with respect to any complaint made during—concerning a sale of a Utilities Division product?

A No, no complaints, No, I know of no instance.

(p. 265) Q During the audit period, do you recall any instance where Ashe & Jones rendered any assistance, or asked to intervene concerning collection of any particular account?

A No, there were none.

* * *

RECROSS EXAMINATION

* * *

Q You just testified that there was no instance during the audit period of Ashe & Jones assisting with regard to any complaints, handling of complaints; is that correct?

A That's correct. The waterworks distributor, or wholesaler, were pretty much if he had any complaints would handle those himself.

Q What do you mean by "handle them himself"?

A Well, he sells the trade, and he services the trade. We have nothing to do with that.

Q But if it's a defective product—

A I know of no instance where we have had a defective product. We may have had a broken fitting, it probably been broken at the time it arrived, would never get out to the trade.

Q Who would handle that then?

(p. 266) A Well, the customer, in all likelihood, would call the office and say we received two broken fittins in the shipment last month, you owe me, and we would replace the fitting, or give him credit for the fitting, or the same information he might relay to Ashe & Jones, and they in turn would relay it to us.

Q So with regard to the audit period, is it your testimony you wouldn't necessarily know about a particular complaint?

A No, that is not my testimony.

Q You indicated that there weren't any handled by Ashe & Jones during the audit period, and then you indicated it could have been handled by Ashe & Jones.

A Let me put it this way: There were no serious complaints, no defective product complaints, that occurred during the audit period. And would I have known about any serious complaints, yes, I would have. So my testimony is that there were none.

* * *

REDIRECT EXAMINATION

* * *

Q The inventory you testified to belonging to the waterworks distributors, that is for products after they had been sold by Tyler Pipe?

(p. 267) A I believe the testimony—I believe the question was: Does the waterworks distributor maintain an inventory, and the answer was yes, he does maintain an inventory.

Q But that is his inventory?

A It's his inventory. He buys and pays for it.

Mr. McKinnon: That is all I have.

The Court: I have one question, and it may not be appropriate to you now, but somewhere along the line I would like to have it answered, and that is whether or not the sales of Tyler Pipe products, Utility Division, to the warehousemen, and distributors here in the State of Washington, is taxed in the State of Texas.

The Witness: The Utilities Division products have taxes applied to them.

The Court: I'm just wondering what kind of taxes. If the sales are taxed, not ad valorem taxes, but whether the sales are taxed in the State of Texas.

The Witness: We pay a tax on inventories. We pay a tax on our production machinery. To that degree, yes, utility products are taxed in the State of Texas. We have, of course, our state, county. In addition, we have our school taxes, and we also have a junior college district that we pay considerable taxes to.

* * *

(p. 268) DIRECT EXAMINATION

By Mr. McKinnon:

Q State your full name for the record, please, and spell your last name.

A Glenn Jones, J-o-n-e-s.

Q And your residence address?

A 3421 East St. Andrews Way, Seattle, Washington.

Q What is your occupation, Mr. Jones?

(p. 269) A I'm a manufacturer's representative.

Q Do you have a company?

A Yes, Ashe & Jones, Incorporated.

Q Is that a Washington corporation?

A Yes.

Q You hold an office in Ashe & Jones?

A Yes, I'm a director and president of the company.

Q Where does Ashe & Jones maintain its office?

A 971 Thomas Street, Seattle.

Q Can you briefly just tell us what you mean by a manufacturer's rep?

A Well, the name is more or less what it implies. We represent manufacturers in the plumbing and allied fields.

Q You represent manufacturers other than Tyler Pipe?

A Yes, we do.

Q But it would be fair to say that you do not represent other manufacturers on directly competing products?

A No, that would not be—you cannot do that in our type of business. They would be products in the plumbing industry, i.e. sinks, toilet seats, that sort of things.

Q Can you just briefly give us a history of Ashe & Jones, how long it's been in the business?

A Well, it's been in business actually through a predecessor company, James A. Reardon Company, which my father was (p. 270) a principal in, and later it was changed in the late '40's to Earl H. Jones, which was my father's name. Then in about '56 or '57, it was changed to Ashe & Jones. But it has a history going back to about 1926, or somewhere in there.

Q Okay. When did the corporation, or its predecessor corporation, commence to represent Tyler Pipe?

A I was in the service at the time, but I think it was about '44, '45. In that time frame.

Q Which divisions of Tyler Pipe do you represent?

A We represent the Utilities and the DWV.

Q Now, there's been testimony that you provide Tyler Pipe with market information.

Can you just briefly relate the process you go through in providing them with that type of information?

A Well, we're calling on ongoing jobbers, and through our contacts over the many years we're familiar with most of the principals in the business. And if there is a market condition, a competitive condition, we would be informed and so inform the foundry.

Q Do you represent Tyler Pipe in areas other than just the State of Washington?

A Yes, we do.

Q Can you briefly tell us what the other areas are?

A We have northern Idaho above Lewiston, the State of (p. 271) Montana. the three western provinces of Canada; Saskatchewan, Alberta, and British Columbia, and the State of Alaska.

Q Do you take any orders on behalf of Tyler Pipe for either of the two divisions that you represent?

A Yes, we receive orders.

Q What do you do with the orders when you receive them?

A In the normal course of business, we would, and today, we usually phone them to the respective division of Tyler.

Q Do you recall, during the audit period—and you understand what the audit period is in this case—have any instance where you took any action with respect to any complaints on any sales of Tyler products?

A In that time frame, I can't recall of any specific instance, no.

Q Have you—does it ever happen that you might do something like this?

A Yes, I think maybe it happened, but it's so infrequent that we have a quality product, and I stretch myself to really think about it in the time frame.

Q During the audit period, you recall any instance where you took any action in order to assist Tyler Pipe in collecting a delinquent account?

A No, I do not.

(p. 272) Q Do you maintain any inventory for Tyler Pipe in the State of Washington?

A None whatsoever.

Q Do you conduct any advertising for Tyler Pipe in the State of Washington?

A No.

Q Now, there are certain instances where sales are called in directly to Tyler at its offices in the State of Texas.

A That's correct.

Q Do you receive a commission on those sales?

A Oh, yes.

Q Do you receive a commission on any sale to a customer in the State of Washington?

A We're the sole representative of those two divisions in the state.

Q What type of information does Tyler Pipe provide you?

A Well, basically with the catalog information, and the discount structure to go with the catalog information.

Q Okay. Anything else that you can think of?

A Well, if there's a new product, we would get brochures, or a bulletin that would be sent to the jobbers and ourselves regarding a new item.

Q Do you recall, during the audit period, receiving any such information with respect to a new item?

(p. 273) A Not in that period, no, sir.

Q Did you ever receive any payment for any of the products that were sold by Tyler Pipe?

When I say "you," does Ashe & Jones receive payment?

A Oh, pardon me. You mean do they pay us?

Q Yes.

A No, sir. It would all go directly to—well, I think on their invoice they have bot a box, I believe, in Dallas, or Tyler. I'm not familiar with that. But it would never come through our hands.

Q Do you pay Washington B & O taxes on the commission that you receive from Tyler Pipe?

A I certainly do.

* * *

CROSS EXAMINATION

* * *

Q With regard to that last point, you pay B & O on commissions that you receive; was that your testimony?

A That is correct.

Q So you don't pay on the gross amount of the sale, just on the commission that you receive?

A There would be no way we could—we're not required to report that way. It would be very hard to report that (p. 274) way anyhow. We report commission from all individuals, the way the tax laws read for the state, I believe.

* * *

(p. 279) CROSS EXAMINATION

* * *

Q Do you ever give him—okay. How about Mr. Meador; why would you be talking to him?

(p. 280) A It would be market conditions in the Utilities Division. And it might—might have to do with areas other than the State of Washington. We have had numerous conversations about Canada, as testified, and other areas. We have discussed Oregon. We have discussed Alaska, at times, market conditions.

Q And Mr. Horan, what would you be calling him about?

A That relationship goes back a long ways. Sometimes it's information, gossip, things going on, people moving around, customers selling out to conglomerates. He's in charge of the exports. I do refer to him on Canadian business. That is his department. He's the export end of the DWV.

Q Oh, in addition to the other divisions, he oversees export sales; is that what you're saying?

A That is correct.

Q And why would you be talking to Mr. Gerhardstein?

A In regards to Soil Pipe market conditions in the United States.

Q Would you ever be talking to Horan, Meador, Gerhardstein, or VanDerbeck, about specific orders; would you have been?

A In the time frame of the audit period, I can't think of ever talking to them about a specific order, no.

Q So it would have been primarily market information; is (p. 281) that correct?

A Right.

* * *

Q You have testified that you were a representative for other companies besides Tyler Pipe; correct?

A That is correct.

Q How many such companies, can you say?

(p. 282) A Offhand, about five, six other manufacturers.

Q And they would have been in non—they would have carried products that were not competitive with Tyler's then; is that right?

A That is correct.

Q Do you—when an order is filled, do you receive a copy of the invoice?

A Yes.

The Court: Was that true even though the order was placed directly by the customer to Tyler Pipe?

The Witness: Yes. We would always receive a copy of every invoice coming in the state.

* * *

(p. 283) Q Okay. Let me rephrase. Start with the Soil Pipe Division.

Did you provide them with information about what the market prices were with soil pipe products?

A Yes.

Q And would they then use that information in establishing their prices for Washington?

A In conjunction with other information, yes.

Q How about the Utilities side, would you provide them with market price information there, too?

A Yes. But in that situation there are less competitors in that field, and it isn't as volatile as, say, the soil pipe sales.

Q So you're saying that changes in prices were less frequent?

A Yes.

Q But ultimately, in all cases, Tyler Pipe set the prices that it would charge to its customers; is that correct?

A That is correct.

* * *

(p. 285) Q How many employees does Ashe & Jones have?

A Counting myself, we have four full time and one part time.

Q And how many of those are sales people then?

A Three and a half.

Q By "sales people" then, are these three and a half people going out and calling on customers; is that correct?

A That is correct.

* * *

(p. 287) Q What do you do on Tyler Pipe's behalf? Can you characterize generally what activities you engage in in the Washington market?

A Well, No. 1, as I said before, we keep them abreast of market conditions. If a new product was to come out, we would try to get to the specifying architects, or engineers—mechanical engineers.

Q Would you explain that, if a new product were to come out?

A We would try to get to the people that specify the use of that material for buildings, i.e. like this courthouse, or Columbia Center, or whatever it is, to make sure this product was at least approved or in their specifications. We might call on contractors to promote the use of our material on a specific job and/or jobs.

Q So when you say, get to the engineers to get them to specify, that would be to specify soil pipe—Tyler soil pipe products?

A Yes. Or if there was a new item in the utilities, it was a specification item, we would do the same with that, (p. 288) of course.

* * *

Q How much of your time would you say is devoted to contacts like that with engineers and architects?

A It varies. Maybe 20 percent, 25 percent.

Q Could it be a third?

A Could be, at times. That is just a guestimate. It's (p. 289) very hard.

* * *

Q Okay. So for what purpose would you be calling on contractors then again?

A To get them to use our product.

Q Do you have well-established relations with most of the architects and engineers in the trade—in the business?

A I would say yes. I have been in it all my adult life.

Q Would the same also be good relations with contractors in the field then as well?

(p. 290) A Yes.

* * *

(p. 292) Q Do you solicit orders from wholesalers?

(p. 293) A Yes.

* * *

(p. 297) Q You indicated about once a year. The question was:

"How often would you say that has happened?

A Infrequently. Maybe once a year."

A What I think, Mr. Tuttle, I might have been referring to, is an invoice that was not paid. Usually it's an oversight often in a chain outfit, where they overlook an invoice. It isn't slow pay, per se. It might be a specific invoice that somehow was not paid, and we might help them clarify that.

Q So you would be involved in that situation?

A Rarely, yes.

* * *

(p. 298) Q I don't mean to use "investigation" in a technical sense, just looking into a competing product in the market.

A Are you saying look into a competitor's activities? Is that what you're referring to?

Q Yes.

A We wouldn't be asked, but we would do it on our own.

* * *

(p. 302) Q Now, if a customer had a complaint about a Tyler Pipe product, would it contact you ordinarily?

A Either way. Could contact us, or could contact the (p. 303) foundry.

Q Would one course be more common than the other, was it, during the audit period?

A We don't have that many problems. I couldn't say. What would be the problem, quality?

Q Non-conforming product, not enough shipped. Any kind of problem.

A In thirty years I could name on one hand.

Q In thirty years there have been less than five times?

A Quality problems, yes.

Q How about insufficient quantity shipped?

A They might contact us. They might contact the factory. I thought you were talking about quality problems. You're talking—

Q I'm talking either one.

A Oh, that does happen. Human beings ship things, and a lot of times they would contact us about that, certainly.

Q So as far as an insufficient quantity being shipped, would it be more common that they would contact you, the customers contact you?

A In the Soil Division, I'd say yes. In the Utilities, either way.

Q How often does that—did that happen during the audit period, would you say, that there was either a non-conforming product, or an insufficient quantity shipped?

(p. 304) A Boy, it would be a wild guess. I couldn't —I mean, it would just be a wild guess. 50 times. I don't know. It would be a wild guess.

Q During the audit period?

A Yes. I would say maybe 10, 12 times a year.

Q And that was—you're saying that is the number of times that you were contacted; is that correct?

A We were contacted, yes. That is a guess, as I say, of course.

Q If you were contacted then, Ashe & Jones, what would you have done—what did you do?

A We would report it to the foundry.

Q Would you make some investigation?

A Not necessarily.

Q If one—if any investigation were required, would it be you that did it, Ashe & Jones?

A Probably, yes. Let me put it this way: If a customer says they got two inch fittings for three inch fittings, we take their word for it, and the foundry would take our word.

Q So in that kind of situation you're acting on behalf—is it correct to say that you're acting on behalf of Tyler in dealing with the customer?

A No, we would go back to the foundry. They would be the ones that would have to decide what to do.

(p. 305) Q But you're not acting for the customer, you're acting for Tyler; is that correct?

A No, we would be acting for Ashe & Jones, and reporting to the foundry.

Q Whatever Tyler told you to do in a situation like that, you would do it; is that correct?

A Yes, they set policy.

* * *

(p. 314) Q Now, I believe you indicated that you have three and a half sales people working for you, including yourself; is that correct?

A That is correct.

(p. 315) Q Can you give me an idea of how often, on an average during the audit period, each of these customers would have been called on by somebody from your company?

A That would vary with the location. Some of them weekly. Some may be monthly, or every other month.

Q Depending on how close they are to Seattle?

A Yes.

Q Are most of them close to Seattle?

A No. About half of those would be in western Washington, roughly.

Q So you're saying that someone from your company would call from—would call on each of these customers on an average of weekly, if they are in western Washington, or monthly?

A That would be a close approximation, yes.

Q Now, you also indicated that you call on engineers, and contractors, and architects; is that correct?

A That is correct.

Q Can you give an approximation of how often they would be called on?

A No.

Q Taking, say, engineers. Are there some that you call on more often than others?

A Yes. The ones that are doing more work would be called on more often, yes.

(p. 316) Q Can you give me a couple of examples of those?

A Names?

Q Uh-huh.

A The firm name, you mean, like—

Q Please.

A Boullion's firm, Dick Stern, Valentine & Fisher.

Q And how often would you say each of those would have been called on during the audit period by someone from your firm?

A Once every six months, perhaps.

May I establish something?

THE COURT: Just respond to questions.

Q (By Mr. Tuttle) How about—can you give me some—who would you call on as far as contractors?

Can you give me some examples?

A Well, there would be Botting.

Q Pardon?

A Botting, B-o-t-t-i-n-g, Warren, Little & Lund.

Q Pardon?

A Warren, Little & Lund. Three names. Gale Mechanical, G-a-l-e, University Mechanical.

Q How often would you call on those, as examples?

A Two or three times a year. Perhaps more on some of the larger ones.

Q Is that pattern fairly typical then of the contractors (p. 317) that you would call on two or three times a year?

A That would be hard to say typical. If they had bid a job, or something, you might call on them a half dozen times in a short time frame. There isn't any typical pattern for that type of call.

Q Would the same be true then for the engineers?

A Yes.

Q Could be more, could be less?

A Yes.

Q Do you view those calls as being important to continuing your relationship with those—that is Tyler's relationship with those engineers and contractors?

A Well, we're not calling on them solely for Tyler. We represent other people.

Q Are those—but my question is: Are those calls important to maintaining Tyler's relationships with them?

A To some extent, yes.

* * *

(p. 321) Q (By Mr. Tuttle) Do you think, Mr. Jones, that during the audit period Ashe & Jones was effective in maintaining good relations for Tyler in the State of Washington?

A Yes.

* * *

(p. 327) Q So as long as you're their representative you get commissions on utility sales regardless of what you do; is that right?

A In the agency business you get commissions on any sales made in your territory from any principal.

Q So it's—why is that? Why is that done? Why should Tyler pay if you didn't make the sale?

A That is not only true of Tyler, that is true of everybody we represent.

Q My question is why.

A Because you're their agent. You receive a commission on what is sold in your territory.

Q You're saying it's the nature of the business, in effect?

A Yes.

* * *

(p. 328) REDIRECT EXAMINATION

By Mr. McKinnon:

Q I'm handing you what has been admitted as Exhibit 20, Mr. Jones, and calling your attention to the third page (p. 329) of that exhibit, which lists the commissions paid Ashe & Jones during the audit period, and I would ask you: Do those commissions paid, as reflected on Exhibit 20, include sales made outside the State of Washington, to your knowledge?

A To my knowledge those would have been out total commissions for our whole territory.

Q That would include sales in Canada?

A Montana.

Q Alaska?

A Yes.

Mr. Tuttle: Counsel, could I see what you're referring to.

Mr. McKinnon: Sure. Exhibit 20.

Q (By Mr. McKinnon) Mr. Jones, do you receive any guidelines from Tyler as to how to conduct the business of Ashe & Jones?

A None whatsoever.

Q Have they ever set any requirements on Ashe & Jones as to how to conduct its business?

A No, never.

Q Have they ever audited the business of Ashe & Jones?

A Never.

Q There was some testimony yesterday with reference that you might quote a sink, or a speciality type product.

(p. 330) For whom would you do that?

A The question was, did we quote. I said, "Yes." But a sink would be another manufacturer. We represent an outfit that is called Alkay Manufacturing that makes sinks. I think I mentioned toilet seats, and we represent an outfift that makes toilet seats, Mr. McKinnon.

Q Does that have anything to do with Tyler?

A None whatsoever.

* * *

(p. 332) DIRECT EXAMINATION

By Mr. Tuttle:

Q Could you state your full name, and business and home addresses, for the record, please?

A Yes. Ronald E. Fahey, 20625 Maplewood Drive, Edmonds, Washington, 98025. Business address is 1016 First Avenue South, Seattle, 98134.

Q How are you employed?

A I'm an independent representative—manufacturers representative.

Q Are you with a particular firm?

A Yes, Mechanical Agents, Incorporated.

Q That address, 1016 First Avenue South, is the address for Mechanical Agents then?

A Yes.

* * *

(p. 343) Q (By Mr. Tuttle) Do you talk to—I assume that you are on a regular basis soliciting orders for Wade; is that correct?

A Yes.

Q In doing so, do you ever have occasion to refer to non-Wade Tyler products?

A No.

Q Is there any advantage—do you ever—you're saying you never refer to a non-Wade Tyler product at all with a customer?

A No.

Q Would the fact that shipments of both Wade and non-Wade Tyler products are made together, would that benefit the customer in any way?

A No.

Q It wouldn't get the product there sooner to him, or products together when he needs both kinds, or anything like that?

A No.

Q Why is that?

A Because orders are shipped from our inventory. We place orders for stock replacement with the factory for shipment to our warehouse. We have got pretty good

* * *

(p. 345) Q Do you ever handle any—have you ever had any non-Wade Tyler products come through your warehouse?

A No. Excuse me. Other than other manufacturers' product that we represent.

Q I said, "non-Wade Tyler products." Other Tyler products from other than from the Wade Division.

A No.

Q Who sets the prices for the Wade products?

A Wade.

Q The prices to the customers?

A Wade.

Q Is that entirely their decision then?

A Yes.

Q Do you provide information about the market to assist them in setting those prices?

A Yes.

EXCERPTS OF DEPOSITION OF JAMES B. HORAN

* * *

(p. 4) Q (By Mr. Tuttle) Mr. Horan, do you utilize the services of the local sales representative in Washington if direct contact from Tyler, Texas doesn't get results from a slow paying customer?

A My reply, I think, was "sometimes."

Q When you—I believe your testimony was that sometimes you—the sales representative would make that contact initially, but then I was inquiring about the situation where the initial contact had been made from Tyler, and has not been fruitful.

Then what happens? Is the sales representative contacted?

A Sometimes.

* * *

(p. 7) Q Do you have knowledge of Tyler's practice with regard to following up on accounts, or collecting accounts, where there has not been yet payment?

Do you have knowledge of that?

A In the broad sense, yes.

Q Again, then my question is: With reference to customers, who are headquartered in Washington, where the initial contact from Tyler, Texas, about nonpayment has not been successful, what are the options available, and customerily followed by Tyler, as far as collecting that account?

A Generally speaking, there are other steps that can be taken by the credit department, without calling on our local representation, to assist us in collecting that debt. Now, one, we advise the customer that no further shipments can be made until such time as the account clears, or an agreement is reached as to when the next check will be written and can be cashed by Tyler Pipe. This does not require the local representative.

Q That would be a contact directly from Tyler?

A That is usually direct contact by a known officer in our credit department.

(p. 8) Q I'm interested in what options are available other than direct from Tyler, Texas, or through the local representative.

A Other than that? Well, if it comes to the worse, then you call upon the credit association, to which we are members, and put that company on file with the credit association, and the credit association then seeks collection.

Q Before that is done, would the local representative be contacted?

A At some point pehaps, yes.

Q You say, "perhaps." Would the local representative be contacted as a matter of course before the credit association became involved?

A Once again, Mr. Tuttle, it might depend on the long term and ongoing relationship with that particular customer. If his tradition and habit has been slow pay,

it might come to pass that it is our decision, made at headquarters, to terminate the relationship with that customer, without, once again, calling into play our local representation.

Q Would it be the usual practice to have the local sales representative become involved if contacts from Tyler, Texas were not successful?

Mr. McKinnon: Objection. That's been (p. 9) asked and answered.

Mr. Tuttle: No, he hasn't answered whether or not that is the usual practice.

Mr. McKinnon: He most certainly has. He said sometimes they might do it.

Mr. Tuttle: "Sometimes" does not answer whether or not it's usual, as opposed to being the exception.

Mr. McKinnon: Go ahead and answer it.

The Witness: No, it's not usual.

Q (By Mr. Tuttle) It's not usual?

A It's not usual.

Q To involve the sales representative.

A No, sir. And may I expand on that?

Mr. McKinnon: Go ahead.

The Witness: The collection of debts is an onerous event in any case, and it should not be the function of local representation to make that an extremely important part of his responsibility to Tyler Pipe. Therefore, Tyler Pipe has established a credit department of sufficient size, and

expertise, to take on that function directly from Tyler, Texas. In all departments, that is our responsibility at Tyler, Texas, to collect the money due us from customers, whoever they might be.

(p. 10) Q (By Mr. Tuttle) Is it the usual practice to involve the local representative before the account is referred for collection by an outside agency?

Mr. McKinnon: Objection. The usual practice is not in issue here. What is in issue is what occurred in Washington during the audit period.

If you can answer, go ahead.

The Witness: Under that framework, I don't know.

Q (By Mr. Tuttle) What do you mean? Under what framework?

A The audit period in the State of Washington. I cannot identify specifics. So my answer would have to be: sometimes.

Q Counsel may have his objection, but I'm wanting to know what—not just in Washington, but during the audit period, what Tyler relies on its sales representatives to do. So I'm asking for your general practice, and I'm saying my question is this:

Was it Tyler's usual practice to involve the local sales representatives in trying to get a payment made from a slow paying customer before that account is referred for collection to an outside agency?

Mr. McKinnon: Objection. It's been asked and answered. Go ahead. You can answer.

(p. 11) The Witness: Once again, I would say: sometimes.

Q (By Mr. Tuttle) More often than not?

Mr. McKinnon: Objection. That is argumentative.

Mr. Tuttle: Counsel, I don't see how it's argumentative to try—

Mr. McKinnon: That's fine. I'm noting my objection on the record. He can go ahead and answer. It will be handled by the Judge. No sense in engaging in colloquy over that.

The Witness: More often than not? Well, I'm going to say yes for the sake—all right, yes.

Q (By Mr. Tuttle) Does Tyler sometimes have changes in the identities of the wholesalers with whom it does business?

A I don't understand that question.

Q Do the wholesalers change?

A You mean the company sells to someone else? It that what you're—

Q No. Do you lose some wholesalers, and get some new ones?

Mr. McKinnon: The question, Mr. Horan, is geared to the State of Washington during the audit period. If you have personal knowledge of any changes (p. 12) during that period.

The Witness: I do not have such knowledge.

Q (By Mr. Tuttle) I want to ask: During the audit period, but outside the State of Washington, did you have chains in wholesalers?

Mr. McKinnon: We're reserving objections. That is clearly irrelevant.

The Witness: I would have to say due to our national activity the answer must be: Yes.

Q (By Mr. Tuttle) When you add a new wholesaler, start doing business with a new wholesaler, do you do an investigation of some kind of that wholesaler?

Mr. McKinnon: Are you talking about someone outside the State of Washington during the audit period?

Mr. Tuttle: Yes.

Mr. McKinnon: Continuing objection.

The Witness: Yes.

Q (By Mr. Tuttle) Who conducts that investigation?

A It's conducted principally by us, since the final determination to accept that customer as a customer is also determined by us.

Q You say primarily by you. Who else would be involved in the investigation?

(p. 13) A Well, the local representation might be involved. Once again, Counsel, this could come from a chain supply house opening a new place of business in the marketplace that we may or may not choose to solicit his business. The local representation would have no responsibility for that whatsoever. That would all accrue to headquarters.

Q In the situation of a chain, you're saying?

A Perhaps a chain, yes. That is an example. It makes my answer cloudy in that respect.

Q I understand that. Assuming it was not a chain, or—assuming it was not a chain, would you ordinarily look to the sales representative for information about the wholesaler before taking it on as a new customer?

Mr. McKinnon: Objection to the form. It assumes facts not in evidence, and a proper foundation has not been laid.

If you can answer, go ahead.

The Witness: In some sense, yes. That is, where is the company located, the size of the billing. But then, once again, it relies on us at the headquarters to examine the profile of that customer. It's financial statement presented to us, and so forth.

Q (By Mr. Tuttle) Yes, I understand what happens, that there is obviously some investigation at headquarters.

(p. 14) I'm trying to find out what you look at the sales representative to find out for you about a new customer.

A Who, what, when, and where answers.

Q So it's a lot—

A Who is it, what are they doing, where is the business located, and so forth.

* * *

EXCERPTS OF DEPOSITION OF WARREN VanDERBECK

* * *

(p. 4) Q Could you describe your position as regional sales manager? What does that responsibility entail?

A The promotion of Tyler products in the area that I have control of, or oversee.

Q Then you have people who report to you for that purpose; is that right?

A Yes. I have some factory people and then I have some representatives that just represent us.

* * *

(p. 6) Q I'm wondering what the differences are between the factory sales people, I guess you call them, and the manufacturer's agents or representatives, those two groups. And the only thing I've heard so far is, it sounds like the manufacturer's representatives can represent a number of—

A Right.

Q Whereas the manufacturer's or the factory sales people represent just Tyler?

A Just Tyler, right.

Q Are there any other differences between those two classifications?

A I guess there is a difference in the rate of commissions, but that would probably be the only thing that I could recall.

Q. Is there one category that is higher than the other?

A Yes. Uh huh.

Q Which is higher?

A The manufacturer's reps would be on a little higher commission rate.

Q Do the factory sales people—am I using the right terminology, is that what you call them?

A. Factory sales people, yes.

(p. 7) Q Do they get any benefits from the company or anything like that, any insurance or—

A They are in the insurance program, yes.

Q And the manufacturer's representatives do not get insurance, then?

A They are independent businessmen, right.

Q So that would be another difference, then, between them?

A Uh huh.

Q Any other differences that come to mind?

A Not that come to mind, no.

Q Does either of the classes have office space provided, say, by the company?

A No.

Q Either receive a car to use or anything like that?

A No.

Q But other than the insurance, then, you are saying that both of them are strictly on commission?

A Right.

* * *

(p. 11) Q Well, let's come back to that. Does the process by which a sale is made to a customer vary as between the (p. 12) factory sales people and the sales representatives?

A I would say no.

* * *

(p. 55) Q You also receive information back from these people, outside sales people, or the representatives; is that right?

A Yes, uh huh.

Q Are they pretty much your source of information as far as the market conditions in their areas?

A Pretty much, yes.

Q And so they, on a routine or regular basis, provide you with that kind of information? That is, what the market is like in their area?

A Well, whenever the market would change, uh huh.

Q Is that just a sort of—

A Nothing on a routine type of—

Q Is that just sort of understood that that is—or expressly stated that that is one of their functions?

A Well, they provide us with that information, they (p. 56) think that we need to know it, so—

Q Do you have any other source for that information?

A Not really, no.

* * *

(p. 62) Q Oh. By the time the representative phones in the order, has he first initiated a check on the customer; is that right?

A No, not necessarily. He makes the decision whether he wants to sell that customer, and then he gets the customer to fill the credit application, which is forwarded to Tyler, and then the Credit Department either says yea or nay.

Q And so that precedes the order, or—

A A new order, yes.

Q From a new customer?

A Uh huh.

Q Let me make sure I understand. The sales representative would say to the new customer, "We have got to get your checked out before we can process your order," is that basically it?

A Well, he has them fill out a credit application, right.

Q Okay. So the credit application, then, is sent (p. 63) from the representative to the Credit Department in Texas?

A Right.

Q Is checked out?

A Right.

Q Then comes back yea or nay?

A Right.

Q And then the order can be sent in.

* * *

(p. 77) Q Now, again, just by way of summary, we have gone through most aspects of the sales transactions. Does this recall to your mind any differences between the factory sales people or the so-called independent or manufacturer's representatives?

(p. 78) A No.

Q As far as the way they operate or anything else?

A None that I can—

Q Other than what you have already listed?

Mr. McKinnon: I'm going to note an objection on the record as to the form of that question.

By Mr. Tuttle:

Q I believe you previously indicated a couple of differences, that is, that the factory sales representatives, you didn't know of any that had written contracts, for example, were as you thought some of the representatives did. Okay. That would be one difference, right?

A Yes.

Q And the factory sales people had some insurance benefits, maybe, that the manufacturer's representatives didn't personally, is that right?

A Right.

Q And I believe you also indicated that in general, the factory sales people probably covered the areas where the territories where Tyler had a little bigger market share; is that right?

A Well, close to home, right.

Q Close to home. Okay. Are there any differences other than those, as far as you are concerned, between the operations of the sales persons, factory sales people, as (p. 79) opposed to the manufacturer's representatives?

A None that I can think of.

* * *

DEFENDANT'S EXHIBIT NO. 4

INTERROGATORY NO. 4: For each department, division, and/or geographic or functional subdivision identified in the preceding answer, please state:

(a) Its function or purpose, including any changes therein, during the audit period;

(b) The location of its headquarters, its principal place of business, and the region it served, including any changes, during the audit period;

(c) If you have not already done so, the organizational structure of its management personnel during the audit period, identifying them (as defined above), including any changes.

ANSWER:

All of the individuals named in the attached organizational charts numbered 4.1, 4.2, 4.3, and 4.4 are employees of Tyler Pipe Industries of Texas, Inc. All except Mr. Markle and Mr. Schantzenbach make their home and work in Tyler, Texas. Mr. Markle, who left the company in 1981, lived in Orefield, Pennsylvania and worked in Macungie, Pennsylvania. Mr. Schantzenbach, who replaced Mr. Markle, lives and works in Macungie.

ATTACHMENT TO INTERROGATORY NO. 4

TYLER PIPE INDUSTRIES, INC.
MARKETING DIVISION

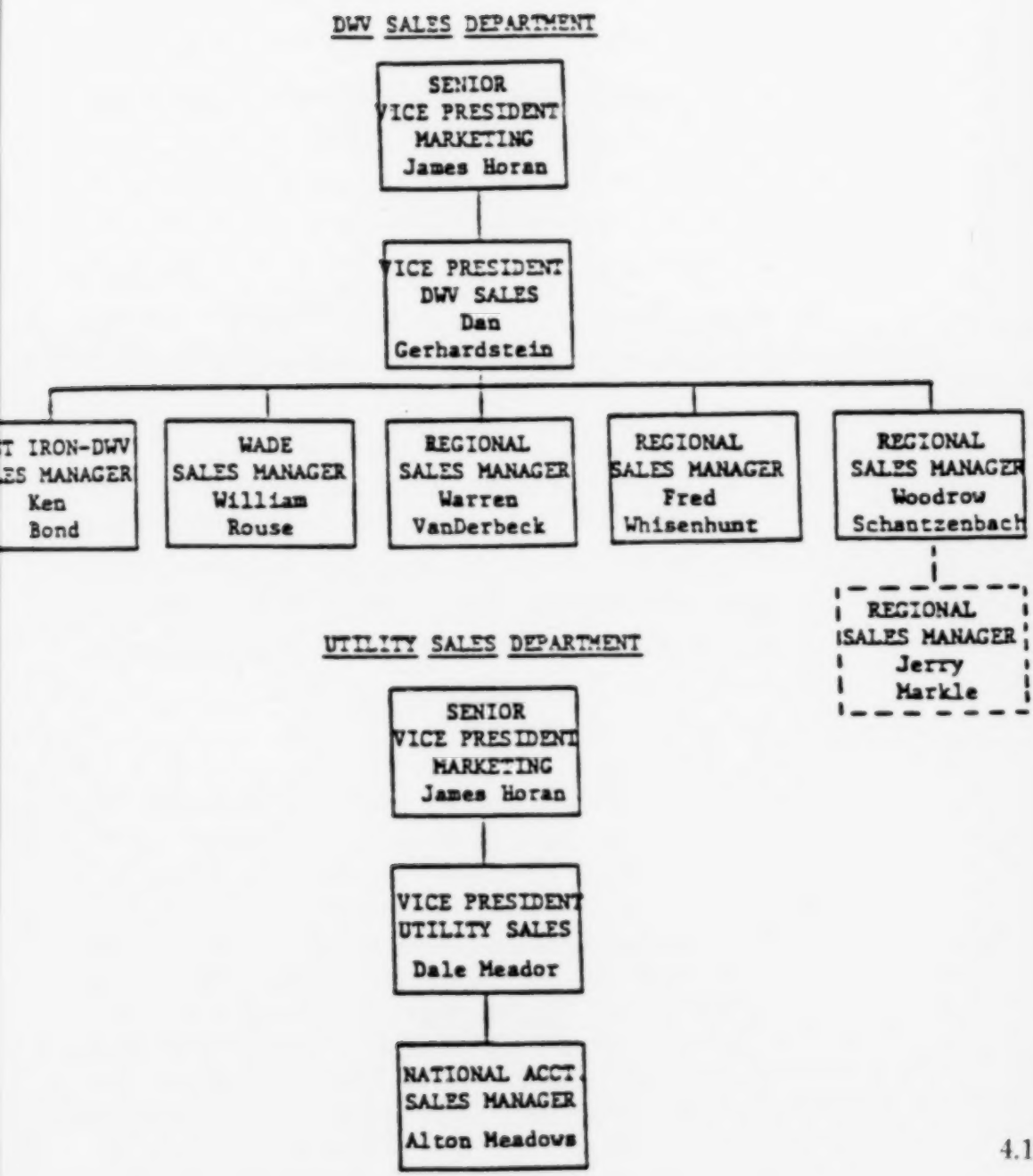
(a) Function — Receive and process customer orders.

(b) Location of headquarters — Tyler, Texas.

* Principal place of business — Tyler, Texas.

* Region served — USA.

(c) Organizational structure of management personnel:



4.1

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DEFENDANT'S EXHIBIT NO. 5

INTERROGATORY NO. 4-2: State, describe and explain:

(a) The respective functions of the DWV Sales and Utility Sales departments in the Marketing Division, including but not limited to the ways in which their respective functions are different and the ways in which they are coordinated or similar;

(b) What, if anything, the initials "DWV" for the DWV Sales Department stand for or signify;

* * *

(d) The respective functions and duties of your Vice President DWV Sales, Cast Iron-DWV Sales Manager, Wade Sales Manager, Regional Sales Manager Warren VanDerbeck, Vice President Utility Sales, and National Acct. Sales Manager . . .

* * *

See attached. Description of Duties is from the Job Descriptions.

ANSWER:

(A.) The products sold by the Utility Sales department reach the market generally through wholesale "waterworks" distributors, whose customers are "utility" contractors, cities, etc. Utility Sales may or may not, use the same sales representatives as the DWV Sales department. The products sold by the DWV Sales department reach the market generally through wholesale plumbing supply distributors, whose customers are "mechanical" and/or "plumbing" contractors. It is the general function for both to accept and fill orders,

and generate and maintain files on the appropriate paperwork pertaining to those orders.

(B.) The initials DWV signify drainage, waste, and vent (piping systems).

* * *

(D.) *Vice President DWV Sales*

FUNCTION:

Under general direction of the Senior Vice President of Marketing, directs all activities pertaining to the DWV Sales Division such as the pricing, promotion and sale of DWV Products and all administrative policies of the Company as related to DWV Division Sales.

DUTIES:

* * *

2. Directs, supervises, evaluates and oversees the performance of Field Sales Representatives on the sale and promotion of all DWV Products and/or revisions in products. Assists Field Representatives in handling customer problems. Reviews and approves DWV Sales monthly commission statements for all Field Representatives. Makes recommendations to Senior Vice President of Marketing on the hiring of new Representatives as vacancies occur.

* * *

(D.) *Regional Sales Manager—Warren Van Derbeck*

FUNCTION:

Under general direction of the Vice President—DWV Sales, performs a combination of selling and promotion duties pertaining to Wade products.

DUTIES:

1. Responsible for coordinating and visiting with sales representatives as assigned so as to keep representatives up-to-date on all phases of Wade product sales and engineering which involves giving instructions on the complete line of Wade products, job take-offs, working from plans and specifications, and the proper method of preparing and pricing quotations and with special emphasis being placed on carrier and shokstop layouts.

2. Assists representatives with calls on mechanical contractors and engineers so as to best serve the mechanical contractors with project layouts and installations and with service to mechanical engineers in an effort to secure Wade specifications. Also assists at job sites with various installation problems, etc.

* * *

4. Responsible for various other duties such as assisting with the planning and preparation of sales meetings; may help prepare specification catalogs and price lists; assist representatives with the closing of orders as necessary; trains representatives on the value of new products with emphasis on proper usage and specifications of same.

* * *

(D.) Vice President—Utility Sales

FUNCTION:

Under general direction of the Senior Vice President of Marketing, directs all activities pertaining to the Utility Sales Division such as the pricing, promotion and sale of Utility Products and all administrative policies of the Company as related to Utility Division Sales.

DUTIES:

* * *

2. Directs, supervises, evaluates and oversees the performance of Field Sales Representatives on the sale and promotion of all Utility products. Responsible for the proper indoctrination and training of Field Representatives on new Utility Products and/or revisions in products. Assists Field Representatives in handling customer problems. Reviews and approves Utility Sales monthly commission statements for all Field Representatives. Makes recommendations to Vice President of Marketing on the hiring of new Representatives as vacancies occur.

* * *

DEFENDANT'S EXHIBIT NO. 9

INTERROGATORY NO. 8-2: State, describe and explain:

(a) How the functions of Tyler Pipe Industries of Texas, Inc. relate to those of your other subsidiaries;

* * *

ANSWER:

(A) Tyler Pipe Industries of Texas, Inc. produces all cast iron and pressure pipe and fittings and specification drainage castings sold and distributed by Tyler Pipe Industries, Inc. (Delaware).

(B) Cast iron and pressure pipe and fittings sold in Washington were manufactured by Tyler Pipe Industries of Texas, Inc. Tyler Plastics Company produced plastic pipe and fittings which were sold in Washington.

(C) Tyler Pipe Industries, Inc. (Delaware) handles sales and distribution of products manufactured by Tyler Pipe Industries of Texas, Inc. and Tyler Plastics Company.

DEFENDANT'S EXHIBIT NO. 13

INTERROGATORY NO. 12: Identity, as defined above, each employee, agent, independent contractor, or other individual who was compensated or paid in any way by Tyler Pipe or any subsidiary and either resided, was physically present, or carried on any activity in Washington at any time during the audit period.

ANSWER:

1. Ashe & Jones, Inc.
2. Bridgeport Sales, Ltd. (Formerly J. G. Beard Co.)
3. Mechanical Agents, Inc.
4. Warren VanDerbeck
5. Manley Hendricks
6. Dan Gerhardstein
7. Dale Meador
8. Alton Meadows

DEFENDANT'S EXHIBIT NO. 15

INTERROGATORY NO. 13: For each individual identified in the answer to Interrogatory No. 12, describe all his or her Washington contracts (residence, presence, activities, etc.) during the audit period, including the dates thereof. Also, identify every document now or ever in your possession (or the possession of any subsidiary) pertaining to each such contract.

ANSWER:

The three companies (1, 2 & 3 under #12 above) handle all sales functions pertaining to our products. The balance of the personnel are located in Tyler, Texas and maintain liason between Tyler Pipe and its subsidiaries and the independent representatives.

DEFENDANT'S EXHIBIT NO. 16

INTERROGATORY NO. 18: Identify each sales representative of Tyler Pipe (or any subsidiary) which was present in Washington at any time during the audit period.

ANSWER:

See numbers 1, 2 & 3 under #12.

DEFENDANT'S EXHIBIT NO. 17

INTERROGATORY NO. 20: For each sales representative identified in the answer to Interrogatory No. 18, state the total dollar volume of Washington sales in which it was involved in any way on behalf of Tyler Pipe or any subsidiary during each year of the audit period. If any Washington sales were made or entered into by Tyler Pipe or any subsidiary directly (without involvement of a sales representative), separately state the total dollar volume of such direct sales during each year of the audit period. If the total of the answers to the preceding two sentences, *i.e.*, sales through sales representatives plus direct sales, does not constitute the total of all sales in Washington customers during the audit period, explain the difference.

ANSWER:

Year	Ashe & Jones	J. G. Beard	Mechanical Agents
1976	3,208,533	235,852	154,130
1977	3,961,831	275,244	140,896
1978	4,845,311	338,403	110,870
1979	5,629,888	364,837	155,955
1980	4,699,547	341,262	441,063

All sales made in Washington resulted in payment of commission to the independent sales representative in whose territory the customer was located even if the customer itself directly contacted Tyler Pipe or its subsidiaries.

DEFENDANT'S EXHIBIT NO. 21

INTERROGATORY NO. 25-2:

* * *

(c) For any sale in Washington during the audit period by you or any subsidiary, was the customer's order initially received by a sales representative and thereafter transmitted by that representative to you or the subsidiary?

(d) If your answer to part (c) is yes, state as nearly as can be determined both the number of orders thus transmitted by a sales representative and the total number of *all* orders (including orders direct to you or a subsidiary) for delivery in Washington during the audit period.

ANSWER:

* * *

(C.) Yes

(D.) As nearly as can be determined the number of orders transmitted by a sales representative in the state of Washington was:

1976	1977	1978	1979	1st 9 MOS 1980
1,371	1,615	1.442	1,693	1.507

The total number of all orders for delivery in Washington during the audit period was:

1976	1977	1978	1979	1st 9 MOS 1980
1,953	2,329	2,522	2,531	2,103

* * *

DEFENDANT'S EXHIBIT NO. 22

INTERROGATORY NO. 27: For each sales representative identified in the answer to Interrogatory No. 18, describe how, if at all, you or any subsidiary either received or gave information from or to that representative during the audit period regarding market conditions, possible needs for your or your subsidiary's existing products, possible needs for new products or new or different designs for existing products, names of customer purchasing agents or other buyers, or any other information relative to marketing or sales of products of Tyler Pipe or any subsidiary.

ANSWER:

None given.

Market conditions, customer information and product information received verbally.

DEFENDANT'S EXHIBIT NO. 23

INTERROGATORY NO. 27-2:

* * *

(e) State, list and describe each source of information obtained by you or any subsidiary during the audit period for or including the Washington State market regarding market conditions, actual and potential customers, and products.

ANSWER:

* * *

(E.) Ashe & Jones, Inc.
Mechanical Agents, Inc.

DEFENDANT'S EXHIBIT NO. 24

INTERROGATORY NO. 27-3

(a) Identify each document or natural or non-natural person from which or from whom you or any subsidiary has received since January 1, 1976 information about the Washington market for your (or its) products. If all such information was obtained from sales representatives, you may so state and only identify such representative(s) by company name(s).

* * *

ANSWER:

(A) ALL SUCH INFORMATION WAS COMMUNICATED ORALLY FROM SALES REPRESENTATIVES, ASHE & JONES, INC. AND MECHANICAL AGENTS, INC.

DEFENDANT'S EXHIBIT NO. 25

INTERROGATORY NO. 28: For each sales representative identified in the answer to Interrogatory No. 18, identify all employees or other agents of Tyler Pipe or any subsidiary who communicated with the sales representative on the matters identified in the preceding interrogatory. For each employee or agent, estimate the frequency of those communications during the audit period.

ANSWER:

Numbers 4, 5, 6, 7 & 8 of #12.

Average once a month.

DEFENDANT'S EXHIBIT NO. 27

INTERROGATORY NO. 30: For each sales representative identified in the answer to Interrogatory No. 18, describe all services performed by that representative on behalf of Tyler Pipe or any subsidiary during the audit period. To the extent those services included solicitation of sales for Tyler Pipe or any subsidiary, describe the manner in which the representative solicited such sales, including the territory within Washington in which each representative operated, the means by which each representative contacted potential and/or former customers, and the frequency of those contacts.

ANSWER:

Quotations of our products for specific construction projects and personal calls soliciting an order. Calls made in person or by phone. We have no means of knowing frequency of such contacts.

Ashe & Jones, Inc.—Covers the State of Washington less the following counties: Wahkiakum, Cowlitz, Skamania, Klichitat, Benton, Franklin, Walla Walla. Soil Division.

Mechanical Agents, Inc. represents us in the same area. For Wade only.

Bridgeport Sales, Ltd. represents us for both Divisions in the above listed counties.

DEFENDANT'S EXHIBIT NO. 28

INTERROGATORY NO. 30-2:

(a) In your answer to defendant's first interrogatory number 30, you stated that all the services performed by Washington sales representatives on behalf of you or any subsidiary during the audit period consisted of quotations of your products and calls soliciting orders. State, describe and explain each other such service performed by a sales representative, including but not limited to furnishing of information about market conditions, customers, and products, handling particular problems as they arose, inspecting products or installations, and otherwise servicing customer accounts.

(b) Your answer to defendant's first interrogatory number 3 included reference to a "Soil Division." For that division state

(1) Its function or purpose, including any changes therein during the audit period;

(2) The location of its headquarters, its principal place of business, and the region it served, including any changes, during the audit period; and

(3) The organizational structure of its management personnel during the audit period, identifying them (as defined above), including any changes.

(c) Name the divisions for which Bridgeport Sales, Ltd. represented you during the audit period.

ANSWER:

(A) Washington sales representatives furnished information about market conditions and customers in the state of Washington.

(B) Soil Division is a name used internally to describe the DWV Division excluding Wade (specification drainage) products.

(1) Same as DWV Division

(2) Same as DWV Division

(3) Same as DWV Division

(C) DWV, Utility and Wade.

DEFENDANT'S EXHIBIT NO. 30

INTERROGATORY NO. 33: For each sales representative identified in the answer to Interrogatory No. 18, describe its efforts during the audit period to maintain and improve the name recognition, market share, goodwill, and customer relations of Tyler Pipe and its subsidiaries.

ANSWER:

This is handled entirely by independent sales representatives through sales calls.

DEFENDANT'S EXHIBIT NO. 33

INTERROGATORY NO. 38: During the audit period, were any offers or other potential sales arranged by a sales representative ever rejected by you or any subsidiary? If so, state how many offers and potential sales were accepted and how many rejected by you or any subsidiary during the audit period.

ANSWER:

No.

DEFENDANT'S EXHIBIT NO. 40

INTERROGATORY NO. 47-3:

(a) Please state or re-state your answer to defendant's (second) Interrogatory No. 47-2. (The copy provided to counsel did not have an answer.) Specifically, has Tyler Pipe or any subsidiary paid to any other state any tax measured in whole or in part by sales in the State of Washington during the audit period? If your answer is yes, list each such state and, for each, the type of tax paid and the dates and amounts of payment.

* * *

ANSWER:

(A) No tax measured by sales in the State of Washington.

* * *

DEFENDANT'S EXHIBIT NO. 41

TYLER PIPE & FOUNDRY COMPANY
P. O. BOX 2027
TYLER, TEXAS

SALES REPRESENTATION AGREEMENT

THIS AGREEMENT, made the 2nd day of MAY, 1966, between TYLER PIPE & FOUNDRY COMPANY, a Texas corporation, having its principal place of business at Swan, Texas, hereinafter called "Manufacturer", and Ashe & Jones Company of Seattle, Washington, hereinafter called "Representative".

AGREEMENT:

In consideration of the mutual covenants and agreements herein contained, the parties agree as follows:

1. *PRODUCTS*: Manufacturer hereby grants to Representative exclusive selling rights of Manufacturer's products listed in Exhibit "A", in the territory covered by this agreement. The Representative agrees to handle no other product that is or may be competitive to the products covered by this agreement.

2. *TERRITORY*: Manufacturer hereby assigns the territory described in Exhibit "A" to Representative on a protected, exclusive basis for the sale of products covered by this agreement, through the wholesale trade. Representative shall receive no commission except on sales made in his territory. Representative is not authorized to sell for export.

3. *PRICES*: Manufacturer agrees to notify Representative promptly in writing or telegraphically at the address hereon noted, or as may be otherwise requested in writing by Representative, of all price changes. Representative shall promptly notify his customers of such price changes. No increase shall be effective with respect to orders taken by Representative on quotations made by Manufacturer prior to time he shall have received notice of such increase in price. Any reduction in the price shall

apply to all orders that have been placed with the Manufacturer but have not been delivered at the time such reductions in price are made.

4. *CREDIT*: Manufacturer shall have the right to approve the credit of any customer. Representative agrees that he will not negotiate business with concerns of doubtful financial responsibility, and that if any special or unusual financial or other risk is involved in the sale of merchandise, he will fully acquaint Manufacturer with all the facts relating thereto at the time the order is placed. Manufacturer may refuse or reject, either in whole or in part, any order received by the Representative, or may cancel any order in whole or in part, previously accepted by Manufacturer but not shipped, which in the opinion of Manufacturer would result in possible loss to Manufacturer or Representative by its completion. Representative shall not make any commitment binding upon Manufacturer unless he has written permission from Manufacturer to do so.

5. *COMMISSIONS*: Manufacturer agrees to credit Representative with commissions on each approved order on all products covered by this agreement, in accordance with the Commission Schedule, Exhibit "A", upon completion of each respective sale made within his territory for delivery within said territory. Payment of commissions for material shipped will be made within twenty (20) days after close of each four (4) week accounting period as to the amounts due for such accounting period as determined in accordance herewith.

If the customer neglects, fails or refuses to pay any part of the purchase price on a sale where the commission has been paid to the Representative or credited to his account and/or whenever it becomes necessary to take back any of Manufacturer's products sold under this agreement, Representative's commission account shall be charged back with the proportional amount of commission originally credited.

6. *DURATION OF AGREEMENT*: This agreement covers all transactions between Representative and Man-

ufacturer from the date of this agreement. All previous agreements, if any, are hereby cancelled. No changes or additions to the terms of this agreement shall be binding on Manufacturer unless made by an amendment signed by its corporate officers. This agreement shall continue in force and effect until terminated by either party on thirty (30) days notice in writing within one (1) year of the effective date of this contract; sixty (60) days notice in writing within two (2) years of the effective date of this contract; ninety (90) days notice in writing within three (3) years of the effective date of this contract; except that any action of Representative not in accordance with established business practices or tending to impair the integrity or reputation of Manufacturer shall be just and sufficient cause of immediate cancellation by Manufacturer.

7. *LAW APPLICABLE*: This agreement shall be construed in accordance with the laws of the State of Texas. Jurisdiction and venue of any controversy in relation hereto shall be in Smith County, Texas.

IN WITNESS WHEREOF, the parties have hereunto set their hands and seals the day and year first above written.

[ASHE & JONES
COMPANY]
By: /s/ [Illegible]
Title: Pres.
REPRESENTATIVE
Address of Representative:
225 Terry Ave N.
Seattle, Wash.

TYLER PIPE & FOUNDRY
COMPANY
By: /s/ James B. Horan
Title: Vice-President, Sales
MANUFACTURER
Address of Manufacturer:
P. O. Box 2027
Tyler, Texas

TYLER PIPE & FOUNDRY COMPANY
P. O. BOX 2027
TYLER, TEXAS

EXHIBIT "A"

TERRITORIES COVERED

REPRESENTATIVE	*TERRITORY*
Ashe & Jones Company 225 Terry Avenue, North Seattle, Washington 98109	51

TERRITORY COVERED:

All State of Montana
Province of British Columbia.
All State of Washington except the following counties: (Cowlitz, Clark, Skamania, Klickitat, Benton, Franklin and Walla Walla).

The following counties in Idaho: (Boundary, Bonner, Keotonia, Shoshone, Benewah, Latah, Clearwater, New Perce, Lewis, Idaho).

COMMISSIONS

	Product	*Commission Basis*
a)	Soil Pipe & Soil Fittings	$ 4.13 Per Ton
b)	Ty-Seal Gasket	2.5%
c)	Staple Specials & Drains	$10.00 Per Ton
d)	Ty-Tool	6.31%
e)	IPS Pipe	$ 1.50 Per Ton
f)	Watermain Pipe	$ 1.50 Per Ton
g)	Specification Drains	
h)	SSB Watermain Fittings	$10.00 Per Ton
i)	Flanged Watermain Fittings	$10.00 Per Ton

j) Fabricated Watermain Pipe $10.00 Per Ton

k) All other Watermain Fittings; Valve, Roadway & Service Boxes; Manhole Rings & Covers; Manhole Steps $ 6.00 Per Ton

l) ....

m) ....

n) ....

o) Freight .....

In extreme competitive situations it may be necessary to reduce commission basis below that stated above, although we will make every effort to maintain the commission structure.

NO COMMISSION will be paid on any watermain materials which Tyler Pipe & Foundry Company must purchase from another company.

PLAINTIFF'S EXHIBIT NO. 45

TYLER PIPE
Subsidiary of
Tyler Corporation

GUIDE TO ORDERING

1. To avoid errors, specify catalog item numbers.

2. When ordering Cast Iron Soil Pipe or Cast Iron Soil Fittings be sure to specify class desired; Service Weight (SV) or No-Hub (NH).

3. When ordering Regular Fittings and Closet Bends, give diameters in this order:

   1. Main 2. Branch or Branches

   When ordering Reducing or Increasing Fittings give diameters in this order:

   1. Spigot of Main 2. Hub of Main 3. Branch of Branches

4. When ordering Long Fittings, (a) Long Bends are measured from the Spigot to the Center Line of the Hub; (b) Long Branch Fittings are measured from the Spigot to the Base of the Hub.

5. To specify right or left side inlets, position fittings as follows and read left or right:

   a. Regular Bends and Offsets, face open Hub with Spigot down.

   b. Branch Fittings, face open Hub of Main with Branch down.

   c. Traps and Closet Bends, face bend as it would be in installed position with hub toward you.

6. All pipe and fittings furnished coated unless otherwise specified.

7. For items not shown in this catalog, call the nearest Sales Office or Plant for quotations and availability.

CONDITIONS OF SALE

Please review individual basic delivered price sheets for each sales division's policy regarding terms, delivery, credit for returns and minimum invoicing.

All claims for return material must be made within ten days after receipt of shipment. When orders have been filled correctly, no credit will be allowed for goods returned unless our written consent has been received. All goods so returned, if accepted, will be credited at cost or prevailing price, whichever is lower at the time, less a minimum handling, transportation and re-conditioning charge when returned on company trucks. Return material shipped LCL or LTL freight must be returned prepaid. Items made to order, especially for an order, are not subject to return or cancellation.

All goods are shipped at purchaser's risk. Claims for damage in transit must be filed with the carrier involved. Shipments should be carefully examined on arrival before signing a receipt. A signed bill of lading or delivery ticket with no exceptions noted will indicate the count, description and condition is satisfactory.

Federal, state and local taxes, if any, will be added to invoices.

All orders are subject to approval of our Home Office before final acceptance. Cancellation or changes in orders are not allowed without our consent. We reserve the right to refuse, cancel or backorder items not in stock or not manufactured by us, whether or not they are shown in this catalog.

All orders and agreements are contingent upon federal, state or municipal action or regulation; strikes or other labor troubles; fire; damage or destruction of merchandise or manufacturing plants; inability to obtain raw materials, labor, fuel or supplies or any other causes whatsoever beyond our control; whether or not similar to any of the causes specifically enumerated, any of which shall release us from performance without liability on orders, agreements, or portions thereof affected.

All orders will be billed according to price in effect at time of shipment. All prices are subject to change without notice.

Possession of this catalog shall not be construed as an offer to sell the products listed.

We warrant to the original purchaser that products of our manufacture are free from defects in material and workmanship. Our obligation under this warranty shall be limited to the repair or replacement at our plant of any products which may prove defective and shall not render us liable for any other or consequential damage to buyer or to any other person.

This warranty is expressly in lieu of all other warranties, expressed or implied, and of all other obligations or liabilities on our part, and we neither assume nor authorize any other person to assume for us any other liability in connection with the sale of our products.

Tyler Pipe, P.O. Box 2027, Tyler, Texas 75710
(214) 882-5511, Telex 73-5410

PLAINTIFF'S EXHIBIT NO. 46

TYLER PIPE INDUSTRIES, INC.
STATE OF TEXAS FRANCHISE TAXES

	1976	1977	1978	1979	1980
TPI—Texas	$ 6,846.75	$23,077.50	$27,897.00	$31,258.75	$35,440.75
TPI—Delaware	1,619.25	2,282.25	2,265.25	3,166.25	3,353.25
Wade, Inc.	2,103.75	2,843.25	2,558.50	2,329.00	2,184.50
Tyler Plastics Co.	854.25	964.75	1,037.00	1,534.25	701.25
Tyler Sand	—	—	—	—	—
Swan Development Co.	1,258.00	1,453.50	1,649.00	1,836.00	—
M. J. Harvey Foundation	144.50	157.25	170.00	182.75	199.75
Tyler Custom Molding	55.00	55.00	—	—	—
TOTAL	$12,881.50	$30,833.50	$35,576.75	$40,307.00	$41,879.50

PLAINTIFF'S EXHIBIT NO. 47

TYLER PIPE INDUSTRIES, INC.
AD VALOREM TAXES

	SCHOOL	STATE & COUNTY	JR. COLLEGE	TOTAL
1976	$150,417.28	$34,296.78	$ 9,968.79	$194,682.85
1977	158,436.48	35,423.71	10,361.43	204,221.62
1978	138,787.70	43,027.37	10,945.72	192,760.79
1979	147,722.86	43,317.10	11,012.08	202,052.04
1980	154,711.05	44,708.09	14,364.24	213,783.38

PLAINTIFF'S EXHIBIT NO. 49

TYLER PIPE INDUSTRIES, INC.
Number Of Invoices Issued
By Division

RE: INTERROGATORY 25-2

11/28/83

Number of Orders Transmitted By a Sales Representative in the State of Washington

	1976	1977	1978	1979	1st 9 Mos. 1980
SOIL	707	825	922	953	532
UTILITY	0	0	0	0	0
PLASTIC	167	173	81	181	47
TOTAL TYLER	874	998	1003	1134	579
WADE	497	617	439	559	928
TOTAL	1371	1615	1442	1693	1507

Number of All Orders for Delivery in Washington

SOIL	721	842	941	973	543
UTILITY	555	680	1050	803	565
PLASTIC	170	177	83	185	48
TOTAL TYLER	1446	1699	2074	1961	1156
WADE	507	630	448	570	947
TOTAL	1953	2329	2522	2531	2103

SUPREME COURT OF THE UNITED STATES

No. 85-1963

Tyler Pipe Industries, Inc.

Appellant

v.

Washington Department of Revenue

Appeal from the Supreme Court of Washington,

The statement of jurisdiction in this case having been submitted and considered by the court, probable jurisdiction is noted. This case is consolidated with 85-2006, *National Can Corporation, et al. v. Washington State Department of Revenue* and a total of one hour is allotted for oral argument.

October 6, 1986

Justice Powell and Justice Scalia took no part in the consideration or decision of this petition.

RELEVANT DOCKET ENTRIES IN CASE NO. 85-2006

DOCKET ENTRIES OF THURSTON COUNTY SUPERIOR COURT

Date	*Entry*	*Case Number*
12/31/84	Complaints for Refund of Taxes filed for:	
	International Paper Company,	84-2-01888-4
	Chrysler Corporation,	84-2-01889-2
	ASC Pacific, Inc.,	84-2-01890-6
	Korry Electronics Co.,	84-2-01892-2
	Data I/O Corporation,	84-2-01893-1
	R.A. Hanson Co., Inc. & RAHCO, Inc.,	84-2-01894-9
	Ford Motor Company,	84-2-01895-7
	Western Steel Casting Company,	84-2-01896-5
	AMF, Inc., AMF Voit, Inc., Ben Hogan Co., Paragon Electric Co., Inc., and AMF Head Sportswear, Inc.,	84-2-01898-1
	Westinghouse Electric Corporation,	84-2-01899-0
	Basic American Foods, Inc.,	84-2-01901-5
	Peter Pan Seafoods, Inc.,	84-2-01902-3
	Lone Star Industries,	84-2-01903-1
	Cominco American Inc. & Cominco Electronic Materials Inc.,	84-2-01904-0
	Fentron Building Products Co.,	84-2-01907-4
	Heath Tecna Aerospace Co.,	84-2-01908-2
	Clark Equipment Company,	84-2-01909-1
	Advanced Technology Laboratories, Inc.,	84-2-01911-2
	Cummins Engine Company, Inc.,	84-2-01912-1
	Miller Brewing Company,	84-2-01913-9
	American Cyanamid Company, Shulton, Inc. and Jacqueline Cochran, Inc.,	84-2-01914-7

Date	*Entry*	*Case Number*
12/31/84	General Brewing Company,	84-2-01915-5
	Longview Fibre Company,	84-2-01917-1
	Pabst Brewing Company and Olympia Brewing Company,	84-2-01918-0
	Quinton Instrument Company,	84-2-01919-8
	E. M. Matson, Jr.,	84-2-01920-1
	A. H. Robins Company,	84-2-01921-0
	Armstrong World Industries, Inc. and Thomasville Furniture Industries, Inc.,	84-2-01922-8
	G. Heileman Brewing Co., Inc. and Rainier Brewing Company,	84-2-01923-6
	Allis-Chalmers Corporation,	84-2-01924-4
	North Pacific Processors, Inc., Alaska Pacific Seafoods, and Kenai Salmon Packing Co.,	84-2-01925-2
	Bethlehem Steel Corporation,	84-2-01926-1
	U.S. Oil & Refining Co.,	84-2-01927-9
	Noel Canning Corporation,	84-2-01928-7
	Trident Seafoods Corporation,	84-2-01929-5
	Foseco, Inc.,	84-2-01930-9
	Mattel, Inc.,	84-2-01931-7
	Welch Foods, Inc.,	84-2-01932-5
	Kalama Chemical, Inc.,	84-2-01891-4
	Xerox Corporation,	84-2-01916-3
	National Can Corporation,	84-2-01900-7
1/21/85	First Amended Complaints For Refund of Taxes Filed For:	
	International Paper Company,	84-2-01888-4
	Chrysler Corporation,	84-2-01889-2
	ASC Pacific, Inc.,	84-2-01890-6

Date	*Entry*	*Case Number*
1/21/85	Korry Electronics Co.,	84-2-01892-2
	Data I/O Corporation,	84-2-01893-1
	R.A. Hanson Co., Inc. & RAHCO, Inc.,	84-2-01894-9
	Ford Motor Company,	84-2-01895-7
	Western Steel Casting Company,	84-2-01896-5
	AMF, Inc., AMF Voit, Inc., Ben Hogan Co., Paragon Electric Co., Inc., and AMF Head Sportswear Co., Inc.,	84-2-01898-1
	Westinghouse Electric Corporation,	84-2-01899-0
	Basic American Foods, Inc.,	84-2-01901-5
	Peter Pan Seafoods, Inc.,	84-2-01902-3
	Lone Star Industries,	84-2-01903-1
	Cominco American Inc. & Cominco Electronic Materials Inc.,	84-2-01904-0
	Fentron Building Products Co.,	84-2-01907-4
	Heath Tecna Aerospace Co.,	84-2-01908-2
	Clark Equipment Company,	84-2-01909-1
	Advanced Technology Laboratories, Inc.,	84-2-01911-2
	Cummins Engine Company, Inc.,	84-2-01912-1
	Miller Brewing Company,	84-2-01913-9
	American Cyanamid Company, Shulton, Inc. and Jacqueline Cochran, Inc.,	84-2-01914-7
	General Brewing Company,	84-2-01915-5
	Longview Fibre Company,	84-2-01917-1
	Pabst Brewing Company and Olympia Brewing Company,	84-2-01918-0

Date	*Entry*	*Case Number*
1/21/85	Quinton Instrument Company.	84-2-01919-8
	E. M. Matson, Jr.,	84-2-01920-1
	A. H. Robins Company,	84-2-01921-0
	Armstrong World Industries, Inc. and Thomasville Furniture Industries, Inc.,	84-2-01922-8
	G. Heileman Brewing Co., Inc. and Rainier Brewing Company,	84-2-01923-6
	Allis-Chalmers Corporation,	84-2-01924-4
	North Pacific Processors, Inc., Alaska Pacific Seafoods, and Kenai Salmon Packing Co.,	84-2-01925-2
	Bethelem Steel Corporation,	84-2-01926-1
	U.S. Oil & Refining Co.,	84-2-01927-9
	Noel Canning Corporation,	84-2-01928-7
	Trident Seafoods Corp.,	84-2-01929-5
	Foseco, Inc.,	84-2-01930-9
	Mattel, Inc.,	84-2-01931-7
	Welch Foods, Inc.,	84-2-01932-5
	Kalama Chemical, Inc.,	84-2-01891-4
	Xerox Corporation,	84-2-01916-3
	National Can Corporation,	84-2-01900-7
1/25/85	Motion For Partial Summary Judgment Filed For Kalama Chemical, Inc.,	84-2-01891-4
1/28/85	Motion for Preassignment of	
	Xerox Corporation,	84-2-01916-3
	Kalama Chemical, Inc.	84-2-01891-4

Date	*Entry*	*Case Number*
1/31/85	Motion For Partial Summary Judgment Filed For Xerox Corporation	84-2-01916-3
2/ 4/85	Order Preassigning	
	Xerox Corporation,	84-2-01916-3
	Kalama Chemical, Inc.	84-2-01891-4
3/18/85	Order Preassigning	
	National Can Corporation	84-2-01900-7
5/21/85	Complaints for Refund of Taxes Filed For	
	Alaskan Copper Companies, Inc.,	85-2-00863-1
	The Firestone Tire & Rubber Co.,	85-2-00864-0
	General Electric Co.,	85-2-00865-8
	Honeywell Inc.,	85-2-00866-6
	Reynolds Metals Corporation,	85-2-00867-4
	Square D Company,	85-2-00868-2
	E. R. Squibb & Sons, Inc., Spacelabs, Inc., Charles of the Ritz Group, Ltd., and Edward Weck & Company, Inc.,	85-2-00869-1
	Alpac Corporation,	85-2-00870-4
5/21/85	Motion for Injunction Staying Collection of Taxes Filed For	
	National Can Corporation,	84-2-01900-7
	Xerox Corporation,	84-2-01916-3
	Kalama Chemical, Inc.	84-2-01891-4

Date	*Entry*	*Case Number*
5/21/85	Motion and Order Making Judgment Rendered in Test Cases Applicable to all Appellants	84-2-01900-7 84-2-01916-3 84-2-01891-4
5/22/85	Complaint for Refund of Taxes Filed For Scott Paper Company	85-2-00879-8
5/22/85	Second Amended Complaint For Refund of Taxes Filed For Xerox Corporation	84-2-01916-3
5/22/85	Motion for Summary Judgment Filed For National Can Corporation, Xerox Corporation, Kalama Chemical, Inc.	84-2-01900-7 84-2-01916-3 84-2-01891-4
5/28/85	Complaints for Refund of Taxes Filed For Mars, Inc., Kal Kan Foods, Inc., and Uncle Ben's, Inc., W. R. Grace & Co., Murray Pacific Corp.	85-2-00919-1 85-2-00920-4 85-2-00921-2
6/24/85	Amended Complaints for Refund of Taxes Filed For Alaskan Copper Companies, Inc., The Firestone Tire & Rubber Co., General Electric Co., Honeywell Inc., Reynolds Metals Corporation, Square D Company,	85-2-00863-1 85-2-00864-0 85-2-00865-8 85-2-00866-6 85-2-00867-4 85-2-00868-2

Date	*Entry*	*Case Number*
6/24/85	E. R. Squibb & Sons, Inc., Spacelabs, Inc., Charles of the Ritz Group, Ltd., and Edward Weck & Company, Inc.,	85-2-00869-1
	Alpac Corporation,	85-2-00870-4
	Scott Paper Company,	85-2-00879-8
	Mars, Inc., Kal Kan Foods, Inc. and Uncle Ben's, Inc.,	85-2-00919-1
	W. R. Grace & Co.,	85-2-00920-4
	Murray Pacific Corp.	85-2-00921-2
6/24/85	Memorandum Opinion Filed in National Can Corporation,	84-2-01900-7
	Xerox Corporation,	84-2-01916-3
	Kalama Chemical, Inc.	84-2-01891-4
7/10/85	Motions and Cross Motions for Summary Judgment Filed in National Can Corporation,	84-2-01900-7
	Xerox Corporation,	84-2-01916-3
	Kalama Chemical, Inc.,	84-2-01891-4
	Alaskan Copper Companies, Inc.,	85-2-00863-1
	The Firestone Tire & Rubber Co.,	85-2-00864-0
	General Electric Co.,	85-2-00865-8
	Honeywell Inc.,	85-2-00866-6
	Reynolds Metals Corporation,	85-2-00867-4
	Square D Company,	85-2-00868-2
	E. R. Squibb & Sons, Inc., Spacelabs, Inc., Charles of the Ritz Group, Ltd., and Edward Weck & Company, Inc.,	85-2-00869-1
	Alpac Corporation,	85-2-00870-4
	Scott Paper Company,	85-2-00879-8
	Mars, Inc., Kal Kan Foods, Inc., and Uncle Ben's, Inc.,	85-2-00919-1
	W. R. Grace & Co.,	85-2-00920-4
	Murray Pacific Corp.,	85-2-00921-2
	International Paper Company,	84-2-01888-4
	Chrysler Corporation,	84-2-01889-2
	ASC Pacific, Inc.,	84-2-01890-6

Date	*Entry*	*Case Number*
7/10/85	Korry Electronics Co.,	84-2-01892-2
	Data I/O Corporation,	84-2-01893-1
	R.A. Hanson Co., Inc. & RAHCO, Inc.,	84-2-01894-9
	Ford Motor Company,	84-2-01895-7
	Western Steel Casting Company,	84-2-01896-5
	AMF, Inc., AMF Voit, Inc., Ben Hogan Co., Paragon Electric Co., Inc., and AMF Head Sportswear, Inc.,	84-2-01898-1
	Westinghouse Electric Corporation,	84-2-01899-0
	Basic American Foods, Inc.,	84-2-01901-5
	Peter Pan Seafoods, Inc.,	84-2-01902-3
	Lone Star Industries,	84-2-01903-1
	Cominco American Inc. & Cominco Electronic Materials, Inc.,	84-2-01904-0
	Fentron Building Products Co.,	84-2-01907-4
	Heath Tecna Aerospace Co.,	84-2-01908-2
	Clark Equipment Company,	84-2-01909-1
	Advanced Technology Laboratories, Inc.,	84-2-01911-2
	Cummins Engine Company, Inc.,	84-2-01912-1
	Miller Brewing Company,	84-2-01913-9
	American Cyanamid Company, Shulton, Inc. and Jacqueline Cochran, Inc.,	84-2-01914-7
	General Brewing Company,	84-2-01915-5
	Longview Fibre Company,	84-2-01917-1
	Pabst Brewing Company and Olympia Brewing Company,	84-2-01918-0
	Quinton Instrument Company,	84-2-01919-8
	E. M. Matson, Jr.,	84-2-01920-1
	A. H. Robins Company,	84-2-01921-0
	Armstrong World Industries, Inc. and Thomasville Furniture Industries, Inc.,	84-2-01922-8

Date	*Entry*	*Case Number*
7/10/85	G. Heileman Brewing Co., Inc. and Rainier Brewing Company,	84-2-01923-6
	Allis-Chalmers Corporation,	84-2-01924-4
	North Pacific Processors, Inc., Alaska Pacific Seafoods, and Kenai Salmon Packing Co.,	84-2-01925-2
	Bethlehem Steel Corporation,	84-2-01926-1
	U.S. Oil & Refining Co.,	84-2-01927-9
	Noel Canning Corporation,	84-2-01928-7
	Trident Seafoods Corporation,	84-2-01929-5
	Foseco, Inc.,	84-2-01930-9
	Mattel, Inc.,	84-2-01931-7
	Welch Foods, Inc.,	84-2-01932-5
7/19/85	Stipulation and Order Consolidating all of Appellants' Actions Into *National Can Corporation vs. State of Washington Department of Revenue,* Cause No. 84-2-01900-7	All of the Above
7/19/85	First Stipulation Re: Exhibits Pertaining to Washington State Budget and Revenues, Including Exhibits 1-31 Filed	84-2-01900-7
7/19/85	Exhibit 32: Confidential Report in Sealed Envelope Admitted for Limited Purpose	84-2-01891-4
7/19/85	Summary Judgment Entered Against National Can Corporation and All Other Appellants	All of the Above
8/ 5/85	Notice of Appeal to Washington Supreme Court Filed	84-2-01900-7

Date	*Entry*	*Case Number*
3/28/86	Mandate Received	84-2-01900-7
5/22/86	Notice of Appeal to the Supreme Court of the United States Filed	84-2-01900-7

DOCKET ENTRIES OF
WASHINGTON SUPREME COURT

8/ 5/85	Notice of Appeal to Washington Supreme Court Filed	51910-2
8/ 7/85	Statement of Grounds For Direct Review Filed	51910-2
9/30/85	Motion for Accelerated Review Filed	51910-2
10/ 4/85	Notation Order Granting Accelerated Direct Review, Combining *Tyler Pipe Industries, Inc. vs. State of Washington Department of Revenue*, No. 51110-1 With *National Can* for Purposes of Oral Argument and Granting *National Can* ⅔ of Oral Argument Time	51910-2
3/ 6/86	Opinion Filed	51910-2
3/27/86	Mandate Filed	51910-2
5/22/86	Notice of Appeal to the Supreme Court of the United States Filed	51910-2

KALAMA CHEMICAL, INC., STIPULATION OF FACTS

[Filed May 1, 1985]

IN THE SUPERIOR COURT OF
THE STATE OF WASHINGTON
FOR THURSTON COUNTY

KALAMA CHEMICAL, INC.,

Plaintiff,

v.

STATE OF WASHINGTON,
DEPARTMENT OF REVENUE,

Defendant.

NO. 84-2-01891-4

STIPULATION OF FACTS

The parties jointly stipulate that to the best of their knowledge and belief the following facts are true and correct:

1. Kalama Chemical, Inc. ("Kalama" or "the company"), is a Washington corporation, having its corporate office in Seattle, Washington.

2. Kalama manufactures and sells chemical products. Its products are sold primarily outside the State of Washington and in the export market.

3. Kalama operates manufacturing facilities in Kalama, Washington, and Garfield, New Jersey. Kalama maintains stocks of its goods (including those it manufactures in Washington) in Illinois, California, New Jersey, Indiana, New York, and Texas (as well as Washington). The original cost of Kalama's property in Washington is $23,762,321. The original cost of its property every-

where (including Washington) is $30,039,160. (Both costs are as of Kalama's fiscal year ended June 30, 1984, and include leased property, based on eight times the net annual rental rate.)

4. In order to sell Washington-manufactured products outside Washington, Kalama employs sales representatives and others whose activities outside Washington contribute to the value of the products that are manufactured in Washington and sold outside this state. The cost of their activities is included in the price Kalama received for those products.

5. Kalama employs a total of approximately 175 people. Approximately 95 of them are employed in Washington and 80 are employed in other states. The company's Washington payroll was $3,297,524 for its fiscal year ended June 30, 1984. Its total payroll everywhere was $6,635,515 for the same period.

6. Kalama's employees in Washington include management/administrative personnel, plant workers, engineers, office personnel, and others whose activities in Washington contribute to the value of the products that are manufactured in this state. The cost of their activities is included in the price Kalama receives for those products.

7. As reported on its returns filed with the Washington State Department of Revenue for business and occupation tax purposes, Kalama's annual out-of-state sales of products manufactured in Washington ranged from $23,981,057 to $29,693,132 during the period January 1, 1980, through December 31, 1984. Kalama paid manufacturing business and occupation taxes to Washington of $495,612.59 (including interest) during that period.

8. Kalama's total sales everywhere were $46,779,613 during its fiscal year ended June 30, 1984. Its sales in Washington were $2,580,766 during the same period.

9. Kalama pays taxes to other jurisdictions on income derived in those locations from the sale of products manufactured in Washington. Kalama pays income tax to the states of California, New Jersey, and Illinois ("the Market States") on the income Kalama derives from the sale in those states of products manufactured in Washington. The income taxed by the Market States is Kalama's gross receipts (i.e., its gross income of every kind and from every source, including its gross proceeds from goods manufactured in Washington and sold in the Market States), minus certain deductions permitted by statute, and multiplied by an apportionment factor. The taxes imposed by the Market States are apportioned on the basis of a three-factor formula that compares Kalama's property, payroll, and sales in those states to its property, payroll, and sales everywhere. For goods Kalama manufactures in Washington and sells in one of the Market States, Kalama's gross proceeds from those goods are attributed to the Market State and are, therefore, included in the numerator of its "sales" or "receipts" factor. Kalama's gross proceed from the same goods are also used by Washington as the measure of its manufacturing tax on Kalama.

10. Kalama pays franchise tax to the State of Texas. The basis of the franchise tax is the corporation's "taxable capital" allocated to Texas. The "taxable capital" of a corporation is its stated capital (*e.g.*, the par value of all shares issued having a par value) and its surplus. The "taxable capital" of a corporation is allocated to Texas

through an apportionment formula. Under the formula "taxable capital" is multiplied by a fraction, the numerator of which is the corporation's gross receipts from business done in Texas and the denominator of which is gross receipts from its entire business. Gross receipts includes the gross proceeds from sales delivered in Texas, services performed in Texas and other business done in Texas. For goods Kalama manufactures in Washington and sells in Texas, Kalama's gross proceeds from those goods are attributed to Texas and are, therefore, included in the numerator of Texas' apportionment formula as receipts from business done in Texas. Washington uses those same gross proceeds as the measure of its manufacturing tax on Kalama.

11. Kalama borrowed and invested funds during the years 1980 through 1984 in the generally available money markets. Kalama's experience with respect to the cost of borrowing money and its return on invested money reflected the prevailing market rates of interest.

12. No claims for refund are made by Kalama in this action on behalf of any corporation that is or has been a subsidiary or affiliate of Kalama. This stipulation is not a waiver of any such claims and is without prejudice to any right any past or present Kalama subsidiary or affiliated corporation may have to seek such relief in a separate action.

KENNETH O. EIKENBERRY
Attorney General
State of Washington

/s/ William B. Collins
William B. Collins
Assistant Attorney General
Attorneys for Defendant

BOGLE & GATES

/s/ D. Michael Young
D. Michael Young
Attorneys for Plaintiff

NATIONAL CAN CORPORATION STIPULATION OF FACTS

[Filed May 17, 1985]

IN THE SUPERIOR COURT OF
THE STATE OF WASHINGTON
FOR THURSTON COUNTY

NATIONAL CAN CORPORATION,

Plaintiff,

v.

STATE OF WASHINGTON
DEPARTMENT OF REVENUE,

Defendant.

NO. 84-2-01900-7

STIPULATION OF FACTS

The parties jointly stipulate that to the best of their knowledge and belief the following facts are true and correct:

1. National Can Corporation ("NCC") is a Delaware corporation, having its principal office in Chicago, Illinois.

2. NCC manufactures and sells packaging products. NCC's products are sold throughout the world.

3. NCC operates manufacturing facilities in 22 states, including Washington. NCC maintains offices in 25 states, including Washington. Exhibit A, which lists NCC's offices and facilities throughout the United States, is incorporated by reference as a part of this stipulation. The original cost of NCC's property in Washington was ap-

proximately $31.9 million. The original cost of its property everywhere (including Washington) was $899 million. (Both costs are as of 1983 and include leased property, based on eight times the net annual rental rate.)

4. In order to sell NCC packaging products in Washington and elsewhere, NCC maintains plants, offices, warehouses and other facilities in states other than Washington, and employs many people outside the State of Washington, including factory workers, engineers, scientists, laboratory technicians, accountants, lawyers, office personnel, warehouse personnel, industrial and public relations personnel, computer programmers, data processors, and other employees whose activities outside Washington contribute to the value of the products that are sold in Washington. The cost of their activities is included in the price NCC receives for those products.

5. In order to sell its products outside Washington, (including the products it manufactures in Washington), NCC maintains offices, warehouses, and other facilities in states other than Washington, and employs many people outside the State of Washington, including sales representatives, engineers, scientists, laboratory technicians, accountants, lawyers, office personnel, warehouse personnel, industrial and public relations personnel, computer programmers, data processors, and other employees whose activities outside Washington contribute to the value of the products that are manufactured in Washington and sold outside this state. The cost of their activities is included in the price NCC receives for those products.

6. NCC employs approximately 10,400 people worldwide. Approximately 240 of NCC's employees are in

Washington. In 1983, NCC's Washington payroll was approximately $7.6 million. Its total payroll everywhere was approximately $238 million.

7. In order to sell NCC packaging products in Washington, NCC maintains a sales office and employs 7 sales and office personnel in Washington whose activities contribute to the value of products sold in this state. The cost of their activities is included in the price NCC receives for those products.

8. In order to manufacture NCC products in Washington, NCC maintains two plants and employs factory workers, engineers, office personnel and others in Washington whose activities contribute to the value of the products that are manufactured in Washington and sold outside this state. The cost of their activities is included in the price NCC receives for those products.

9. As reported on returns filed with the Washington State Department of Revenue for business and occupation tax purposes, NCC's annual Washington sales of products manufactured outside Washington ranged from $19.9 million to $32 million during the period January 1, 1980, through December 31, 1984. NCC paid wholesaling taxes to Washington of $606,863.26 on such sales during that period.

10. As reported on returns filed with the Washington State Department of Revenue for business and occupation tax purposes, NCC's annual out-of-state sales of products manufactured in Washington ranged from $11.3 million to $18.7 million during the period January 1, 1980, through December 31, 1984. NCC paid manufacturing taxes to Washington of $372,843.78 during that period.

11. As reported on returns filed with the Washington State Department of Revenue for business and occupation tax purposes, NCC's gross receipts from goods both manufactured and sold in Washington ranged from $71.4 million to $78.5 million during the period January 1, 1980, through December 31, 1984. NCC paid wholesaling taxes to Washington of approximately $1,800,000 on such gross receipts during that period.

12. Between January 1, 1980 and December 31, 1984, NCC paid approximately $2,800,000 in Washington State business and occupation taxes. In this action, NCC is seeking a refund of approximately $980,000 plus reasonable interest.

13. NCC's 1983 total sales everywhere were approximately $1.552 billion. Its 1983 sales in Washington were approximately $110 million.

14. NCC pays taxes to other jurisdictions on income derived in those locations from the sale of products manufactured in Washington. NCC pays taxes to the states of Arizona, California, Georgia, Illinois, Minnesota, Oregon and Wisconsin ("the Market States") on the income NCC derives from the sale in those statesof [sic] products manufactured in Washington. The income taxed by the Market States is NCC's gross receipts (i.e., its gross income of every kind and from every source, including its gross proceeds from goods manufactured in Washington and sold in the Market States), minus certain deductions permitted by statute, and multiplied by an apportionment factor. The state income taxes imposed by the Market States are apportioned on the basis of a three-factor

formula that compares NCC's property, payroll, and sales in those states to its property, payroll, and sales everwhere. [sic] For goods NCC manufactures in Washington and sells in one of the Market States, NCC's gross proceeds from those goods are attributed to the Market State and are, therefore, included in the numerator of its "sales" or "receipts" factor. NCC's gross proceeds from the same goods are also used by Washington as the measure of its manufacturing tax on NCC.

15. NCC pays taxes to other jurisdictions on income derived from its sales of products in Washington. NCC pays taxes to the State of California on the income NCC derives from manufacturing goods in California and selling them in Washington. NCC's gross proceeds from the same goods are also used by Washington as the measure of its wholesaling tax on NCC. The income taxed by California is NCC's gross receipts (i.e., its gross income of every kind and from every source, including its gross proceeds from goods manufactured in that state and sold in Washington), minus certain deductions permitted by statute, and multiplied by an apportionment factor. California's tax is apportioned on the basis of a three-factor formula that compares NCC's property, payroll, and sales in California to its property, payroll, and sales everywhere. For goods NCC manufactures in California and sells in Washington, the property and payroll of NCC's plants that produce those goods and of its offices in the manufacturing state are included in the numerator of that state's property and payroll factors, respectively.

16. Washington is the only state in which NCC is subjected to a gross receipts tax measured by 100% of

the gross receipts from the sale of products manufactured in and sold outside the taxing state.

17. Between 1980 and 1984, NCC manufactured some articles in Washington for its own use. The total value of products so manufactured does not exceed $10,000. NCC paid manufacturing B&O tax to Washington on that activity, and such tax is not included in the amount of the refund sought in this action.

18. NCC borrowed and invested funds during the years 1980 through 1984 in the generally available money markets. NCC's cost of borrowing money and its return on invested money were interest in the range of ½% to 2½% over the prevailing prime lending rate.

19. No claims for refunds are made by NCC in this action on behalf of any corporation that is or has been a subsidiary of [sic] affiliate of NCC. This stipulation is not a waiver of any such claims and is without prejudice to any right any past or present NCC subsidiary or affiliated corporation may have to seek such relief in a separate action.

KENNETH O. EIKENBERRY
Attorney General
State of Washington

/s/ William B. Collins
William B. Collins
Assistant Attorney General
Attorneys for Defendant

BOGLE & GATES

/s/ D. Michael Young
D. Michael Young
Attorneys for Plaintiff

STIPULATION OF FACTS
EXHIBIT A

NATIONAL CAN CORPORATION
SUMMARY OF REAL PROPERTY LOCATIONS IN THE U.S.

REVISED 03/21/84

ST	ZIP	CTY	CITY	STREET ADDRESS	DIVISION	FACILITY
AL	38215	—	Birmingham	124 Carbon Road, P.O. Box 94067	MCD	PLANT
AZ	85031	—	Phoenix	211 N. 51st Avenue	MCD	PLANT
CA	94010	—	Burlingame	P.O. Box 1699, 1657 Rollins Road	MCD	PLANT
CA	94010	—	Burlingame	1657 Rollins Road	MCD	SALES
CA	94010	—	Burlingame	1657 Rollins Road	CEQS	OFFICE
CA	90701	—	Cerritos	11544 South Street, P.O. Box 8000	MCD	SALES
CA	91744	—	City of Industry	437 North Baldwin Park Boulevard	CLOSURE	PLANT
CA	90023	—	Los Angeles	2615 South Bonnie Beach Place	MCD	PLANT
CA	90023	—	Los Angeles	4212 East 26th Street	MCD	PLANT
CA	90040	—	Maywood	4855 East 52nd Place	GLASS	PLANT
CA	95351	—	Modesto	430 Doherty Avenue	MCD	PLANT
CA	94577	—	San Leandro	2050 Williams Street	MCD	PLANT
CT	06810	—	Danbury	Great Pasture Road	MCD	PLANT
CT	06801	—	Danbury	Old Ridgebury Road, P.O. Box 160	PLATICS	SALES
CT	06801	—	Danbury	Old Ridgebury Road, P.O. Box 160	PLATICS	PLANT
FL	32205	—	Jacksonville	3331 West 12th Street	MCD	PLANT
GA	30345	—	Atlanta	1760 Century Circle	MCD	SALES

IL	60638	—	Bedford Park	7300 South Narragansett Avenue	CLOSURE PLANT
IL	60638	—	Bedford Park	7420 South Meade Avenue	PLATICS PLANT
IL	60651	—	Chicago	1031 North Cicero Avenue	CLOSURE PLANT
IL	60609	—	Chicago	1101 West 43rd Street	MCD PLANT
IL	60638	—	Chicago	5620 West 51st Street	MCD PLANT
IL	60638	—	Chicago	5620 West 51st Street	MCD SALES
IL	60631	—	Chicago	8101 West Higgins Road	EXECUTIVE HDQ
IL	60631	—	Chicago	8101 West Higgins Road	MCD SALES
IL	60631	—	Chicago	8101 West Higgins Road	PLATICS HDQ
IL	60016	—	Des Plaines	1000 East Northwest Highway	MCD PLANT
IL	60016	—	Des Plaines	1000 East Northwest Highway	CENG OFFICE
IL	60007	—	Elk Grove Village	2500 Lively Boulevard	MCD PLANT
IL	60007	—	Elk Grove Village	2520 Lively Boulevard	MCD ART
IL	60143	—	Itasca	751 North Hilltop Avenue	PLATICS PLANT
IL	60143	—	Itasca	750 North Hilltop Avenue	PLATICS SALES
IL	61111	—	Loves Park	5800 Industrial Avenue	MCD PLANT
IL	60521	—	Oaksbrook	1211 West 22nd Street	MCD SALES
IL	60068	—	Park Ridge	400 West Higgins Road	GLASS SALES
IL	61109	—	Rockford	627 Grable Street	CEQS PLANT
IN	47705	—	Evansville	2201 West Harvland Street	CLOSURE PLANT
IN	46404	—	Oary	North Bridge Street	MCD WAREHOUSE
IN	46350	—	La Porte	300 North Fail Road	MCD PLANT
IN	46952	—	Marion	P.O. Box 249	GLASS PLANT
IN	46952	—	Marion	P.O. Box 249, East Charles Street	EXECUTIVE HDQ
IN	46390	—	Wanatah	US Highway 30	MCD PLANT

MA	01757	—	Milford	P.O. Box 398, National Avenue	GLASS	PLANT
MA	02162	—	Newton Lower Falls	2345 Washington Street	MCD	SALES
MA	02162	—	Newton Lower Falls	2345 Washington Street	GLASS	SALES
MD	21207	—	Baltimore	7133 Rutherford Road	MCD	SALES
MD	21230	—	Baltimore	2147 Wicohico	GLASS	WAREHOUSE
MD	21093	—	Baltimore	10 Berard Avenue	GLASS	SALES
MD	21219	—	Sparrows Point	2010 Reservoir Road	MCD	PLANT
MD	21219	—	Sparrows Point	2010 Reservoir Road	CEQS	OFFICE
MI	48084	—	Troy	3221 West Big Beaver Road	GLASS	SALES
MN	55107	—	St. Paul	139 Eva Street	MCD	PLANT
MN	55107	—	St. Paul	139 Eva Street	CEQS	OFFICE
MN	55113	—	St. Paul	1805 W. County Road C	MCD	PLANT
MN	55114	—	St. Paul	2085 Ellis Avenue	PLATICS	PLANT
MN	55110	—	White Bear Lake	3564 Rolling View Drive	MCD	SALES
MO	63105	—	Clayton	135 North Meramec Avenue	GLASS	SALES
MO	63105	—	Clayton	222 South Meramec Avenue	MCD	SALES
MO	63105	—	Clayton	222 South Meramec Avenue	CEQS	OFFICE
MO	63070	—	Pevely	P.O. Box 615, Hwy. 61 & 67	GLASS	PLANT
MO	63132	—	St. Louis	10777 Baur Boulevard	PLATICS	PLANT
MS	39567	—	Pascagoula	3202 Denny Avenue	MCD	PLANT
NC	28209	—	Charlotte	1515 Mockingbird Lane –	GLASS	SALES
NC	27893	—	Wilson	P.O. Box 1757, 2200 Firestone Parkway	GLASS	PLANT

NJ	07066	—	Clark	67 Walnut Avenue	CLOSURE	PLANT
NJ	07066	—	Clark	67 Walnut Avenue	MCD	SALES
NJ	08817	—	Edison	135 National Road	MCD	PLANT
NJ	08332	—	Millville	P.O. Box 150 South 2nd St.	GLASS	PLANT
NJ	08854	—	Piscataway	South Randolphville Rd at Rt. 287	MCD	PLANT
NY	14618	—	Rochester	1467 Monroe Avenue	GLASS	SALES
NY	10607	—	White Plaines	297 Knollwood Rd.	GLASS	SALES
OH	43502	—	Archbold	R.R. #3, Box 9B	MCD	PLANT
OH	45246	—	Cincinnati	#7 Triangle Park Drive	GLASS	SALES
OH	43227	—	Columbus	6100 Channingway Blvd.	MCD	SALES
OH	43302	—	Marion	1240 West Center Street	MCD	PLANT
OH	43207	—	Obetz	2120 Buzick Drive	MCD	PLANT
OH	44481	—	Warren	Griswold Street Exit	MCD	PLANT
OK	73179	—	Oklahoma City	3400 South Council Road	MCD	PLANT
OK	73107	—	Oklahoma City	3810 Northwest 3rd Street	PLATICS	PLANT
PA	18051	—	Fogelsville	100 National Drive	MCD	PLANT
PA	17331	—	Hanover	RD H3 Box 22	MCD	PLANT
PA	16301	—	Oil City (Closed)	P.O. Box 334, Rouseville Rd.	GLASS	PLANT
PA	15235	—	Pittsburgh	201 Penn Center Blvd., Office 407	GLASS	SALES
PA	19462	—	Plymouth Meeting	661 West Germantown Pike	GLASS	SALES
PA	19482	—	Valley Forge	P.O. Box 964	MCD	SALES
SC	29010	—	Bishopville	609 Cougar Street	MCD	PLANT

TN	38017	— Collierville	110 South Byhallia Road	MCD	PLANT
TN	38119	— Memphis	1255 Lynfield Road	MCD	SALES
TX	76011	— Arlington	2205 East Randol Hill Road	MCD	SALES
TX	76140	— Fort Worth	8800 South Freeway	MCD	PLANT
TX	77029	— Houston	8501 East Freeway	MCD	PLANT
TX	77339	— Kingwood	2218 North Park, Suite K	MCD	SALES
TX	75165	— Waxahachie	P.O. Box 677, I Hwy. 35-E at Hwy. 287	GLASS	PLANT
WA	98031	— Kent	1220 North Second Avenue	MCD	PLANT
WA	98055	— Renton	15 South Grady Way	MCD	SALES
WA	98660	— Vancouver	2601 N.W. Lower River Road	MCD	PLANT
WI	53105	— Burlington	P.O. Box 120, South McHenery St.	PLANT	SALES
WI	54306	— Green Bay	P.O. Box 2386	MCD	PLANT
WI	53222	— Wauwatosa	10721 West Capitol Drive	GLASS	SALES

XEROX CORPORATION STIPULATION OF FACTS

[Filed May 17, 1985]

IN THE SUPERIOR COURT OF WASHINGTON
FOR THURSTON COUNTY

XEROX CORPORATION,
Plaintiff,

v.

STATE OF WASHINGTON,
DEPARTMENT OF REVENUE
Defendant.

NO. 84-2-01916-3

STIPULATION OF FACTS

The parties jointly stipulate that to the best of their knowledge and belief the following facts are true and correct:

1. Xerox Corporation ("Xerox") is a New York corporation, having its corporate office in Stamford, Connecticut.

2. Xerox manufactures and sells office equipment. Xerox products are sold throughout the world. None of this equipment is manufactured in Washington State.

3. Xerox operates manufacturing facilities in New York, California, and Texas. Xerox maintains offices in 48 states, including Washington.

4. Xerox operates regional distribution centers. Each distribution center handles specific and limited product lines. For example, Xerox duplicating equipment sold in Washington is distributed through the Santa Fe Springs, California, regional distribution center. Xerox typewriters and other nonduplicating office equipment sold in

Washington are distributed through the Dallas, Texas, regional distribution center. Xerox office supplies sold in Washington are distributed through the Compton, California, distribution center. Xerox does not operate a distribution center in Washington.

5. Xerox's administrative functions are performed in regional headquarters. For example, Xerox sales representatives selling in Washington are responsible to a regional sales office in Walnut Creek, California. Xerox's West Coast tax operations are headquartered in Santa Ana, California. The Santa Ana office has responsibility for tax planning in 17 western states, including Washington. Credit collection policy, advertising and marketing strategy, and salesmen compensation plans are developed and administered at Xerox's Rochester, New York, office. Central administrative functions are not performed in Washington.

6. The original cost of Xerox's property in Washington was $25,919,898. The original cost of its property everywhere (including Washington) was $4,544,650,836. (Both costs are as of 1983 and include leased property, based on eight times the net annual rental rate.)

7. In order to sell Xerox-manufactured products in Washington and elsewhere, Xerox employs many people outside the state of Washington, including factory workers, engineers, architects, scientists, laboratory technicians, accountants, lawyers, office personnel, warehouse personnel, computer programmers, data processors, and other employees. Their activities outside Washington contribute to the value of the products that are sold in Washington. The cost of their activities is included in the price Xerox receives for those products.

8. Xerox employs approximately 55,000 people. Approximately 460 of Xerox's employees are in Washington and 54,540 are in other states. In 1983, Xerox's Washington payroll was $13,875,256. Its total payroll everywhere in 1983 was $1,751,280,789.

9. In order to sell Xerox-manufactured products in Washington, Xerox maintains sales offices, services offices, and a products demonstration center in Washington, and employs sales representatives, service technicians, clerical/administrative personnel, and others in Washington whose activities contribute to the value of products sold in this state. The cost of their activities is included in the price Xerox receives for those products.

10. As reported on returns filed with the Washington State Department of Revenue for business and occupation tax purposes, Xerox's annual Washington sales of products manufactured outside Washington ranged from $64.4 million to $75.7 million during the period January 1, 1980, through December 31, 1984. Xerox paid retailing and wholesaling taxes to Washington of $1,537,075.68 during that period.

11. Xerox's 1983 total sales everywhere were $4,963,342,857. Its 1983 sales in Washington were $67,569,385.

12. Xerox pays taxes to other jurisdictions on income derived from its sale of products in Washington. Xerox pays taxes to the states of California and New York on the income Xerox derives from manufacturing goods in those states and selling them in Washington. Xerox's gross proceeds from the same goods are also used by Washington as the measure of its retailing and wholesaling taxes on Xerox. The income taxed by California and New York is Xerox's gross receipts (i.e., its gross income of every kind and from every source, including its gross proceeds

from goods manufactured in those states and sold in Washington), minus certain deductions permitted by statute, and multiplied by an apportionment factor. California's and New York's taxes are apportioned on the basis of a three-factor formula that compares Xerox's property, payroll, and sales in those states to its property, payroll, and sales everywhere. For goods Xerox manufactures in California or New York and sells in Washington, the property and payroll of Xerox's plant that produces those goods, its distribution centers, and its corporate and/or regional headquarters located in the manufacturing state are included in the numerator of that state's property and payroll factors, respectively.

13. Xerox borrowed and invested funds during the years 1980 through 1984 in the generally available money markets. Xerox's experience with respect to the cost of borrowing money and its return on invested money reflected the prevailing market rates of interest.

14. No claims for refund are made by Xerox in this action on behalf of any corporation that is or has been a subsidiary or affiliate of Xerox. This stipulation is not a waiver of any such claims and is without prejudice to any right any past or present Xerox subsidiary or affiliate corporation may have to seek such relief in a separate action.

KENNETH O. EIKENBERRY
Attorney General
State of Washington

/s/ William B. Collins
William B. Collins
Assistant Attorney General
Attorneys for Defendant

BOGLE & GATES

/s/ D. Michael Young
D. Michael Young
Attorneys for Plaintiff

AFFIDAVIT OF GARY O'NEIL

IN THE SUPERIOR COURT OF WASHINGTON
FOR THURSTON COUNTY

NO. 84-2-01900-7

NATIONAL CAN CORPORATION,

Plaintiff,

vs.

STATE OF WASHINGTON,
DEPARTMENT OF REVENUE,

Defendant.

NO. 84-2-01916-3

XEROX CORPORATION,

Plaintiff,

vs.

STATE OF WASHINGTON,
DEPARTMENT OF REVENUE,

Defendant.

NO. 84-2-01891-4

KALAMA CHEMICAL, INC.,

Plaintiff,

vs.

STATE OF WASHINGTON,
DEPARTMENT OF REVENUE,

Defendant.

AFFIDAVIT OF GARY O'NEIL

KENNETH O. EIKENBERRY,
ATTORNEY GENERAL

William B. Collins
Assistant Attorney General
415 General Admin. Bldg., AX-02
Olympia, WA 98504 (206) 753-5528

STATE OF WASHINGTON)
) ss.
County of Thurston)

GARY O'NEIL, being duly sworn on oath, says:

1. *IDENTIFICATION.*

I am the Assistant Director of the Washington State Department of Revenue for Research and Information and have acted in that capacity since 1977.

2. *RESEARCH AND INFORMATION DIVISION.*

The duties of the Research and Information Division include the compilation of statistical information with respect to the tax laws of the state and their administration. Prior to July 1, 1984 the Research and Information Division was charged with the responsibility of making revenue forecasts. After July 1, 1984 this became the responsibility of the Economic and Revenue Forecast Council. The Research and Information Division continues to supply technical assistance to the Council. The Research and Information Division is also responsible for preparing Fiscal Notes for the legislature describing the fiscal impact of proposed legislation.

3. *FIRST PURPOSE OF AFFIDAVIT PARAGRAPHS 3-9.5.*

The first purpose of this affidavit is to estimate the potential tax refund liability to all affected taxpayers that would be incurred by the State of Washington for the years 1980 through 1984 in the event of a decision in favor of the taxpayer in this action and in the two related cases before this Court for hearing. In the development of the estimates set forth in this affidavit I have been assisted

by counsel assigned to the Department as well as by employees of the Department in the Research and Information Division, the Excise Tax Division, and the Information Systems Section of the Department of Revenue.

4. *SEPARATE ESTIMATES FOR MANUFACTURING AND SELLING B&O TAX.*

I have been informed by counsel for the Department of Revenue in this action that claims in litigation allege that Washington's extracting and manufacturing B&O tax on Washington's extractors and manufacturers selling products so extracted or manufactured in interstate commerce is unconstitutional. Other claims in litigation allege that Washington's selling (wholesaling and retailing) B&O tax, imposed on those manufacturing products outside of Washington and selling them within this state, is unconstitutiional.

The estimates in this affidavit are separately set forth for the manufacturing B&O tax and the selling B&O tax, and are based on the information and assumptions more fully explained below.

5. *INITIAL REVENUE ESTIMATES AND PURPOSE.*

After the decision of the U.S. Supreme Court in *Armco, Inc. v. Hardesty*, — U.S. —, 81 L.Ed.2d 540, 104 S.Ct. 2620 (1984) the Department of Revenue was asked to determine the extent of potential liability to the State of Washington if (a) Washington's manufacturing B&O tax was invalidated as applied to Washington manufacturers selling products in interstate and foreign commerce and (b) Washington's selling B&O tax was invalidated

as applied to out-of-state manufacturers selling products in the State of Washington.

These estimates of tax refund liabilities were set forth by the State of Washington in its Preliminary Official Statement, dated January 25, 1985, accompanying the issuance of the State of Washington general obligation refunding bonds (Series 1985AO).

Revised estimates of tax refund liability are set forth in paragraphs 6, 7 and 8 below, with accompanying explanations for derivation of the estimates.

6. *POTENTIAL REFUNDS TO CURRENT CLAIMANTS.*

6.1 *Washington Manufacturers—Actual Claims*

	1980	1981	1982	1983	1984	Total
6.1(A) Amounts claimed by taxpayers filing for 1980 only (adjusted and subject to the assumptions as described in subpar. 6.3)	$ 10,908,841	—	—	—	—	$ 10,908,841
6.1(B) Amounts claimed by taxpayers filing for 1980 and subsequent years (adjusted and subject to the assumptions as described in subpar. 6.3)	8,598,942	9,288,740	9,559,888	11,961,624	16,012,846	55,422,040

6.2 *Out-of-State Manufacturers—Actual Claims*

6.2(A) Amounts claimed by taxpayers filing for 1980 only (adjusted and subject to the assumptions as						

described in subpar. 6.3)	685,597	—	—	—	—	685,597
6.2(B) Amounts claimed by taxpayers filing for 1980 and subsequent years (adjusted and subject to the assumptions as described in subpar. 6.3)	4,532,312	4,637,124	4,838,434	7,623,175	7,764,462	29,395,507
						96,411,985
Interest (computed through Dec. 31, 1985)						8,564,214
CURRENT TAX REFUND CLAIMS						$104,976,199

6.3 *Assumptions Underlying 6.1 and 6.2.*

6.3(A) A review of claims filed by persons seeking refunds, either administratively with the Department of Revenue or in litigation demonstrated a number of discrepancies between the amounts claimed and taxes paid during the period(s) for which refund was sought with regard to both Washington manufacturers and extracting B&O tax and selling B&O tax. Some claims were less than the amount of applicable taxes reported to the Department. The great majority of discrepancies, however, in number and amount, represented claims in excess of the amounts of taxes reported. Analysis of the discrepancies suggests that such differences may be attributable to (a) careless or deliberate overstatement of claims at year-end to avoid understatement that would prevent subsequent refund for the full amount to which a taxpayer might be legally entitled, (b) failure to report the amount on the proper line of the Combined Excise Tax Return (e.g., manufacturing tax reported on wholesaling line of return), and (c) failure to reduce amounts of taxes shown to have been paid on the manufacturing, wholesaling or retailing reporting lines by credits taken for inventory taxes paid or pollution equipment installed.

6.3(B) These figures also assume the right to refund of the amounts so claimed is attributable to the issues in this litigation and not to other causes.

7. *PROJECTED REFUNDS TO CURRENT CLAIMANTS* (including those claiming for 1980 only or 1980 and one or more, but not all of years at issue).

7.1 *Washington Manufacturers.*

	1981	1982	1983	1984	Total
Amounts subject to claims by taxpayers who have currently filed refund claims. Potential claims for subsequent years are based on amounts of taxes adjusted as described in subpar. 7.3)	9,407,102	8,901,827	10,644,297	16,011,579	44,964,805

7.2 *Out-of-State Manufacturers.*

Amounts subject to claims by taxpayers who have currently filed refund claims. Potential claims for subsequent years are based on amounts of taxes actually paid (and adjusted as described in subpar. 7.3)	631,109	585,940	760,293	682,353	2,659,695
					$47,624,500
Interest Computed to Dec. 31, 1985					3,243,577
TOTAL REFUND CLAIM POTENTIAL					$50,868,077

7.3 *Adjustment and Assumptions Underlying 7.1 and 7.2.*

7.3(A) "Amounts of taxes actually paid" include reductions for inventory tax credits and pollution equipment credits.

7.3(B) Taxpayers who have filed either administrative claims with the Department of Revenue or claims in litigation with respect to the year 1980 will amend existing claims to add claims for the subsequent years 1981-84.

8. *ESTIMATES OF TAX REFUNDS FOR TAXPAYERS NOT CURRENTLY CLAIMING REFUND.*

8.1 *Washington Manufacturers*

	1981	1982	1983	1984	Total
Amounts subject to tax refund claim by taxpayers who have not yet filed claims for refund (as determined by methodology set forth in sub-par. 8.4)	26,504,158	23,238,285	36,894,079	49,775,578	$136,412,097

8.2 *Out-of-State Manufacturers*

	1981	1982	1983	1984	Total
Amounts subject to tax refund claim by taxpayers who have not yet filed claims for refund (as determined by methodology set forth in sub-par. 8.5)	30,431,767	31,975,626	39,616,532	41,253,185	143,277,110
					$279,689,207
Interest Computed to Dec. 31, 1985					19,123,063
TOTAL REFUND CLAIM POTENTIAL					$298,812,270

8.3 *Assumptions Underlying 8.1 and 8.2*

(A) Other taxpayers who have not yet filed tax refund claims for taxable years still open under the statute of limitations will file such claims beginning with the taxable year 1981.

(B) All amounts set forth in tax returns and used in deriving these estimates would be recoverable under the issues in this litigation (this assumption also underlies subpar. 7.1 and 7.2).

(C) For purposes of estimating claims by out-of-state manufacturers, 1983 was used as a representative year. (See subpar. 8.5(C), *infra.*)

8.4 *Methodology for Estimates for Washington Manufacturers*

The Department of Revenue has estimated a potential tax refund liability of Washington manufacturing tax by taking amounts paid for manufacturing B&O tax set forth in the Quarterly Business Review, a publication of the State of Washington. The Quarterly Business Review is a standard report issued by the Research and Information Division of the Department which summarizes manufacturing B&O tax reported to the Department each calendar quarter by individual manufacturers. The Department did not include the Quarterly Business Review figures for extracting B&O tax. Credits for inventory tax and pollution control equipment were then subtracted from these amounts. On the basis of such information, the Department estimated the potential manufacturing B&O tax refund liability for all taxpayers (including those identified in subpar. 6.1 and 7.1) as follows:

1980	$ 40,900,000
1981	45,200,000
1982	41,700,000
1983	59,500,000
1984	81,800,000
	$269,100,000

The amounts set forth in subpar. 6.1 and 7.1 have been subtracted from these amounts to derive the estimates set forth in subpar. 8.1.

8.5 *Methodolgy for Out-of-State Manufacturers*

The Department of Revenue estimated the potential tax refund liability of Washington selling B&O tax on out-of-state manufacturers selling within Washington (including taxpayers identified in subpar. 6.2 and 7.2).

(A) Taxpayers classified as wholesalers doing business in Washington but having a business address outside Washington were identified from a data base maintained by the Information System Section of the Department. Those companies classified as retailers were disregarded.

(B) The list of taxpayers was supplied by the Research and Information Division to the Excise Tax Division which determined which of such taxpayers engaged in actual manufacturing outside of Washington.

(C) The Research and Information Division then determined the total wholesaling and retailing B&O tax paid by this group of taxpayers so identified. To this figure was added the wholesaling and retailing B&O tax paid by taxpayers actually registered with the Department as out-of-state manufacturers. This latter figure was taken from

the Quarterly Business Review. The sum of the two figures for 1983, the last year for which the Department has complete figures, was found to be $53,000,000. This amount was rounded down to $50,000,000, which represents the projected potential refund liability of wholesaling and retailing B&O tax for 1983.

(D) To calculate the wholesaling and retailing B&O tax for 1980, 1981, 1982 and 1984 the Research and Information Division applied a factor to the 1983 base figure of $50,000,000. The factor was the relationship of the actual, entire wholesaling tax reported in 1981 by registered out-of-state manufacturers as shown in the Quarterly Business Review divided by the actual wholesaling tax reported in that publication for 1983. A similar factor was developed for 1980, 1982 and 1984.

(E) On the basis of the foregoing calculations the Department has estimated the potential selling B&O tax refund liability (including taxpayers previously identified in subpar. 6.2 and 7.2) as follows:

1980	$ 33,700,000
1981	35,700,000
1982	37,400,000
1983	48,000,000
1984	49,700,000
	$204,500,000

The amounts derived in this subparagraph (E) are overstated for the reason that (1) a number of taxpayers whose principal places of business are outside of Washington nevertheless maintain manufacturing facilities in Washington from which products are sold within the state;

and (2) no exclusion has been made for amounts paid on selling activities of products *not* manufactured by these taxpayers. The validity of the taxes attributable to such sales is not in issue in this litigation but is reflected in the amounts shown in this subparagraph (E). The portion of such amounts attributable to intrastate sales in Washington cannot be determined without audits of individual taxpayers.

(F) The amounts set forth in subpar. 6.2 and 7.2 have been subtracted from the amounts set forth in (E) above to derive the estimates set forth in subpar. 8.2.

9. *ESTIMATED ACTUAL AND PROJECTED POTENTIAL TAX REFUND LIABILITY.*

9.1 *Washington Manufacturers*

(A)	Actual claims for 1980 and other years (subpar. 6.1)	$ 66,330,881	
(B)	Projected claims by 1980 claimants for subsequent years (subpar. 7.1)	44,964,805	
(C)	Projected claims by potential claimants (subpar. 8.1)	136,412,097	
			$247,707,783

9.2 *Out-of-State Manufacturers*

(A)	Actual claims for 1980 and other years (subpar. 6.2)	30,081,104	
(B)	Projected claims by 1980 claimants for subsequent years (subpar. 7.2)	2,659,695	
(C)	Projected claims by potential claimants (subpar. 8.2)	143,277,110	
			176,017,909
	POTENTIAL CLAIMS (exclusive of interest)		$423,725,692

9.3 *OTHER CALCULATIONS* (Interest Payable on Refunds).

I have been advised by counsel for the Department of Revenue that taxpayers in the three related cases before this Court for hearing have placed in issue the validity of the interest currently paid to taxpayers upon refund of taxes determined to have been overpaid. The calculation of interest on potential tax refunds set forth in paragraphs 6, 7 and 8 below has been made at the existing statutory rate (3%) and computed as if owing from the final day of each calendar year for which a refund might be due.

10. *SECOND PURPOSE OF AFFIDAVIT PARAGRAPHS 10-13.*

Under Washington's business and occupation (B&O) tax as confirmed by counsel assigned to advise the Department, manufacturers in Washington who sell their products at retail or wholesale in Washington pay a B&O tax on the selling activity. RCW 82.04.440 provides an exemption from the manufacturing B&O tax for those who pay tax on their selling activity, except with respect to products manufactured for their own use. The second purpose of this affidavit is to set forth the manufacturing B&O tax such manufacturers would have paid if RCW 82.04.440 did not provide an exemption for tax on the manufacturing activity.

11. *ESTIMATE OF MANUFACTURING TAX ATTRIBUTABLE TO RCW 82.04.440.*

The Department estimates that the manufacturing tax attributable to the exemption in RCW 82.04.440, based on 1983 returns filed by Washington manufacturers selling at the wholesaling and retailing level within the state,

would be approximately $44 million. The manufacturing tax attributable to RCW 82.04.440 for first six months of 1984 $17 million or $34 million on an annualized basis.

12. *EVALUATION OF MANUFACTURING TAX ESTIMATES.*

The amounts set forth in paragraph 11 are overstated for the same reason taxes are overstated in subparagraph 8.5(E) (p. 11). The information utilized by the Department in its estimates does not identify those Washington manufacturers with manufacturing facilities outside the state which sell products from those locations in Washington. Such sales would be reported on the wholesaling or retailing line of the Combined Excise Tax return, which has been used as the measure of the tax payable shown in paragraph 5. The identification of such out-of-state facilities and the sales in Washington attributable to those locations would require individual audit of the taxpayers; such information is not otherwise available to the Department.

13. *METHODOLOGY FOR ESTIMATING MANUFACTURING TAX IN PARAGRAPH 11.*

These estimates of the manufacturing B&O tax set forth in the preceding paragraph have been derived by the Research and Information Division under my instruction and supervision in the following manner:

(A) Washington manufacturers registered with the Department of Revenue under the major manufacturing groups, set forth in the Standard Industrial Classification ("SIC") Manual, were first identified. A copy of such major group listing is attached as *Schedule A* to this affidavit. Excepted from the Department's computation was major group 21 "Tobacco Manufacturers", there being no such registered taxpayers in this state.

(B) The data base maintained by the Department for taxpayers classified by major manufacturing SIC group permits the Department to compile information concerning taxes paid annually either (i) by individual manufacturer or (ii) by all manufacturers under each major SIC group, by aggregating the amounts reported by Washington manufacturers on the appropriate lines of the Combined Excise Tax return, filed by taxpayers, with respect to such manufacturers' selling activities at the wholesale and retail level. A copy of the Washington Combined Excise Tax return is attached as *Schedule B*.

(C) The taxable base against which the manufacturing B&O tax was applied for 1983 and for the first six months of 1984 by Standard Industrial Classification code is set forth in *Schedule C* of this affidavit together with the computation of tax derived by applying the manufacturing B&O tax rate to such base.

(D) At the time of these computations the Department of Revenue did not have entered in its data base taxes paid by Washington manufacturers for the final two calendar quarters of 1984. The Department at the time of this affidavit is completing that part of its internal audit which adjusts for mathematical errors shown on returns filed by taxpayers for the final two quarters of 1984.

/s/ Gary O'Neil

SUBSCRIBED AND SWORN TO before me this 20th day of May, 1985.

/s/ Sharon L. McCall

NOTARY PUBLIC in and for the State of Washington, residing at Olympia.

AFFIDAVIT OF DANIEL KELLER

[Filed July 19, 1985]

IN THE SUPERIOR COURT OF
WASHINGTON FOR THURSTON COUNTY

NO. 84-2-01900-7

NATIONAL CAN CORPORATION,

Plaintiff,

vs.

STATE OF WASHINGTON,
DEPARTMENT OF REVENUE,

Defendant.

NO. 84-2-01916-3

XEROX CORPORATION,

Plaintiff,

vs.

STATE OF WASHINGTON,
DEPARTMENT OF REVENUE,

Defendant.

NO. 84-2-01891-4

KALAMA CHEMICAL, INC.,

Plaintiff,

vs.

STATE OF WASHINGTON,
DEPARTMENT OF REVENUE,

Defendant.

AFFIDAVIT OF DANIEL KELLER

Kenneth O. Eikenberry, Attorney General
William B. Collins
Assistant Attorney General
415 General Admin. Bldg., AX-02
Olympia WA 98504 (206) 753-5528
....., Wa. .....

STATE OF WASHINGTON)
) ss.
County of Thurston)

DANIEL KELLER, being first duly sworn upon oath, deposes and says:

1. IDENTIFICATION.

I am currently employed by the State of Washington as acting Assistant Director for the Budget Division of the Office of Financial Management, having served also as Senior Executive Policy Coordinator in that division.

I have been with the Office of Financial Management since 1967 and have held the position of Senior Executive Policy Coordinator since 1977. From 1967 to 1977 my principal responsibilities were as budget analyst/budget coordinator for all natural resource functions of state government, and from 1971 to 1976 I also worked on compensation issues such as salary and benefits.

From 1962 to 1967 I was a budget analyst with the Federal Bureau of Reclamation, providing budget analysis for irrigation project construction and operations.

I received my Bachelor of Arts degree in finance from the University of Washington. I have done some graduate studies in finance and accounting toward a Masters degree in business administration.

2. BUDGET AND POLICY DIVISION.

The Budget Division of the Office of Financial Management is the principal central financial entity for all of state government providing budget and financial advice and recommendations to the Governor, developing the Governor's budget proposals to the legislature, providing the support to explain the budget proposals, and providing other statewide financial data to both the legislature and the public. My responsibilities include determining the cost and making recommendations concerning budget proposals that have impacts across state agency lines such as salary increases, benefit increases, pension funding, and state debt service. I am also responsible for developing the tables indicating the current and projected financial status of the state general fund and all other funds under various alternative conditions at any time. In the past I have also been responsible for coordinating the revenue portion of the same budget.

3. PURPOSE OF AFFIDAVIT.

The purpose of this affidavit is threefold:

3.1 To describe the fiscal situation of the State of Washington during the period in which the budget for the July 1, 1985 - June 30, 1987 biennium was under consideration by the legislature and enacted into law.

3.2 To describe with reference to the budget document enacted into law and related documents introduced in this cause as exhibits certain details in the 1985-87 biennial budget including provisions dealing with appropriations (or their absence for the second fiscal year of the biennium (July 1, 1986 - June 30, 1987)), and

3.3 To (i) describe and to quantify possible reductions in amounts appropriated by the legislature for the 1985-87 biennium and the program impacts of such reductions, in the event the State of Washington were required to pay during the biennium as the result of the litigation in this cause tax refunds for the period 1980-84 that approximate $424 million, and (ii) identify other sources of payment for such liabilities.

4. STATE BUDGET 1985-87 BIENNIUM.

4.1 The biennial budget described in this affidavit, except where otherwise indicated, is the "general fund budget". The general fund budget is that part of the total state budget which provides for the operations of most state agencies including the delivery of social services and production of natural resources and providing a major portion of the appropriations for the state's common schools (K-12) and its other educational facilities including community colleges and the state universities. Revenues contributing to the general fund budget include the state's business and occupation tax, retail sales and use taxes, certain other taxes and a certain number of federal grants.

4.2 The total state budget for the biennium, of which the general fund budget is a part, also includes specially dedicated revenues which are more particularly described in subparagraphs 4.8 and 8.4 herein.

4.3 In December, 1984 the then outgoing Governor, John Spellman, submitted to the legislature a proposed general fund budget for the 1985-87 biennium, as required by law, projecting state general fund revenues at $9,646,439,000. Proposed revisions to the 1985-87 operating budget were then submitted to the legislature by incoming Gov-

ernor Booth Gardner showing a revised projection of state general fund revenues in the amount of $9,624,796,000.

4.4 In March 1984 the State's Economic and Revenue Forecast Council projected a decline in general fund revenues for the 1985-87 biennium of $153,000,000, reducing estimates to a level of $9,493,000,000.

4.5 In June 1985 further revisions of projected general fund revenues for the 1985-87 biennium by the Economic and Revenue Forecast Council indicated a further reduction in such revenues in the magnitude of $221,300,000, thereby lowering anticipated general fund revenues for the biennium to a level of $9,271,700,000. This projection was subsequently adjusted to $9,313,000,000 at the time of adoption of the 1985-87 biennial budget.

4.6 The continued reduction in estimates of general fund revenues has reflected the reliance of the state's tax structure on sales taxes for a major portion of such general fund revenues at a time when the projected level of consumption of goods and services in the State of Washington has been declining and the State's unemployment rate has exceeded that of the national average.

4.7 The uncertainty in the general fund revenue forecast caused by the anticipated June 1985 revisions caused adjournment of the legislature in May without the passage of a budget for the 1985-87 biennium. The legislature reconvened in special session on June 10 and adopted the state budget for the 1985-87 biennium.

4.8 The total state budget for the 1985-87 biennium, including estimated federal funds of $3.4 billion, is $17.9 billion. Of that total, $9.1 billion comes from the state general fund. Support for the broad based state general fund

comes from taxes including: sales and use, business and occupation, utility, property and various other excise taxes and an additional element of federal support. The balance of the state budget after reduction for federal funds ($3.4 billion) and general fund revenues ($9.3 billion) is $5.2 billion, and is derived from other, non-general fund sources.

Revenues assignable to non-general fund sources include generally (1) certain tax revenues, most notably motor vehicle fuel taxes; (2) licenses, permits and fees—of which the largest single amount is comprised of motor vehicle licenses and fees; (3) other charges and miscellaneous revenue which incorporate proceeds of bond issues, tuitions and sales of services, materials and supplies. These categories of revenue are set forth more fully in Attachment A.

4.9 The projected surplus at the end of the 1985-87 biennium of $173 million (represented by $9,313 million of projected state general fund revenues in excess of general fund appropriations of $9,140 million) must be evaluated in light of the following considerations:

(a) Appropriations for the second year of the biennium, with few exceptions, contain no general adjustments over the first year for workload or caseload increases or for inflation. Inflation adjustments at the annual rate of 4.3 percent to maintain the same level of services in the second year of the biennium as provided in the first year would approximate $50 million.

(b) State general funds in the budget for public pension obligations is $676 million or $246 million below the state actuary's recommendation for current funding to avoid increasing the State's un-

funded liability obligation which now exceeds $3.2 billion.

5. STATE PROGRAM REDUCTIONS.

5.1 In the event the State is required to issue tax refunds of the magnitude involved in this litigation, it must then confront the necessity of across-the-board reductions in all state programs. However, because of state constitutional requirements, the entire $9.1 billion state general fund budget is not subject to reduction. The basic K-12 public school program is under constitutional protection; likewise revenues collected on behalf of and dedicated to local governments are free from reduction. These dollar amounts are as follows:

K-12 Public School	$4.24 billion
Local Government Revenue	.21 billion
TOTAL	$4.45 billion

5.2 With $4.4 billion of the budget not subject to reduction, there remains only the balance of $4.7 billion from the general fund portion of the budget which could be subject to reductions to raise the necessary revenue. Were an appellate court to order tax refunds as early as June 1986, one-half of the current biennium would have expired before any reduction program could be put in place leaving at most $2.35 billion from which to take the necessary funds. A $424 million reduction, taken from this budget balance, would represent approximately an 18 percent cut in all programs. With any state general fund reduction across the board, one-half would have to come from the human resource programs of the Department of Social and Health Services and

Department of Corrections. This means an 18 percent reduction in aid to the (a) 65,000 families receiving Aid to Dependent Children; (b) 310,000 persons who monthly receive Medical Assistance; (c) 16,000 persons receiving Nursing Home Care to the Aged; (d) institutional support to 4,000 mentally and physically handicapped persons; and (e) some 7,000 inmates currently in correction facilities.

5.3 Programs in state community colleges and higher education institutions currently serving some 80,000 and 69,000 enrollees respectively would likewise be impacted with an 18 percent across the board reduction in state support. Education and vocational training opportunities for many would have to be curtailed or eliminated.

5.4 Human resource programs and higher education make up 72 percent of the "unprotected" available budget. Selective reductions could not be made in the required amount, $424 million, without significantly affecting any area. For instance, the entire Adult Correction Program budget for the biennium totals only $323 million, which represents only three-fourths of the amount necessary to provide for the tax refund liability. Income maintenance of the so-called "welfare" program with Aid to Dependent Children receives a budget of $437 million for the entire biennium. The Medical Assistance budget is $438 million and Nursing Home Care budget is $271 million.

5.5 Entire elimination of the community college system with its 80,000 students and 7,300 employees would provide $481 million for the biennium, half of that amount over the second year of the biennium. Closing the University of Washington with its 30,000 students and 12,000 employees would release $437 million over the full biennium or $218 million in its second year.

6. STAFF CUTS.

The only remaining alternative of staffing reduction also has very severe consequences. $424 million represents approximately 33 percent of the $1,290 million biennial state general fund cost of classified staff in the State of Washington. With only one-half of the biennium left, the reduction would amount to an estimated 66 percent cut in all classified staff. (Classified staff includes merit (civil) service employees but excludes commissioned state patrol offices, faculty at community colleges and four-year universities, ferry service workers, and employees of the legislature and judicial branches.) If all employee jurisdictions were reduced including faculty, exempt personnel, state patrol, and all others, the staff reduction needed would still be approximately 38 percent.

7. TAX REFUNDS PAYABLE

The budget consequences described in paragraphs 5 and 6 pertain to estimated tax refunds for which the State of Washington might be liable for the tax years 1980-84, and do not take into account claims for refunds which might be attributable to 1985 or any subsequent year or portion thereof to the time of judgment adverse to the State. The budget consequences described in paragraphs 5 and 6 are also based on the anticipated General Fund Revenue for the 1985-87 biennium as projected by the Economic and Revenue Forecast Council (¶ 4.5).

8. QUALIFICATIONS TO DESCRIPTION OF STATE PROGRAM REDUCTIONS.

8.1 The program reductions hypothesized in paragraphs 5 and 6 represent the type of state budget adjust-

ments that would be required upon the occurrence of other adverse economic events of comparable dimension such as fluctuations in the economic cycle thereby resulting in a decrease in budget revenues.

8.2 Moreover, the explanation of expenditure impacts in paragraphs 5 and 6 above do not take into account the possible availability of the budget surplus in the 1985-87 biennial budget, additional taxes that might be enacted by the legislature from alternative tax sources, or increased revenues from an improved economy.

8.3 At the request of plaintiffs' counsel I have made alternative calculations showing the impact of tax refunds of varying amounts on state programs and staff. These are shown in Attachment B. Like the figures in paragraphs 5 and 6 the amounts in Attachment B do not take into account budgeted surplus or increased revenues from additional taxes or diversions of non-general fund revenues into the general fund. Attachment B shows for example that if refunds were made in the amount of $50 million in the 1987-89 biennium and spread across the board, the percentage decreases in program (including human services, corrections and education other than K-12) and the related staff cuts would be:

PROGRAM REDUCTIONS	STAFF CUTS
0.5%	1.1%

8.4 (a) The reductions in state programs from state general fund revenues, discussed in paragraphs 5 and 6, do not take into account the possible availability of non-general fund revenues in the state budget. Certain of these

revenues could be redirected by the legislature either under current law or by subsequent legislative change.

(b) By the same token, however, certain revenues in the non-general fund portion of the state budget are constitutionally restricted to certain purposes or are otherwise limited to particular objects of expenditures. For example: (i) Amendment 18 to the Washington Constitution (Art. II, § 40) limits highway funds to use "exclusively for highway purposes". The Enabling Act by which the State of Washington was admitted into the Union restricts proceeds from timber and other natural resource sales to education purposes; (ii) Federal funds allocated to the State of Washington are restricted in their use to the particular purposes for which they are distributed; (iii) The use of the proceeds of bond issues for purposes other than for which the bonds are marketed are similarly limited.

(c) The availability of non-general fund revenues to legislative redirection or reappropriation (computed over the entire 1985-87 biennium) is represented as follows:

Non-General Fund Revenues (¶ 4.8)			$ 5.2
less:	constitutionally restricted revenues	$1.7	
	Proceeds of bond issues	1.1	
	Debit Service	.7	3.5
Non-General Fund Revenues subject to legislation appropriation			$1.7 billion

The application of all or a portion of non-general fund revenues shown to be subject to redirection would have significant impacts, depending on the magnitude of their

redirection, on programs which include, for example, higher and community college education (tuitions), fish conservation (license fees), and alcoholic rehabilitation programs (liquor tax revenues). Of greater importance is the fact that many programs dependent on user fees for their continuation will simply cease to exist or will only continue in truncated form, if these revenues are diverted for the purpose of meeting tax refund liabilities.

I have read the above and believe the same to be true and correct to the best of my knowledge.

/s/ DANIEL KELLER

SUBSCRIBED AND SWORN TO before me this 18th day of July, 1985.

/s/ Shelley A. Sadie
NOTARY PUBLIC in and for the State of Washington, residing at Olympia.

ATTACHMENT A

Non-General Fund Sources	*Billions*
Motor Vehicle Fund	$ 1.6
Bond Proceeds	1.1
Bond Payment Funds	.7
Trust Funds (like unemployment compensation and industrial insurance payments)	.2
Public School Construction Funds	.1
State Patrol Funds	.1
Ferry Operation Funds	.1
Liquor Board Funds	.1
Other: Including	1.2
Game Fund	
Highway Safety Fund	
Timber Management Fund	
Traffic Safety Fund	
Agricultural Inspection Funds	
Internal Support Funds	
TOTAL	$ 5.2

ATTACHMENT B

POSSIBLE IMPACTS ON STAFFING AND PROGRAM LEVELS IF NO ADDITIONAL TAXES OR REVENUES

Assumed Reductions From Refunds or Revenue Declines or Other Reasons	SECOND YEAR OF 1985-87 BIENNIUM FISCAL YEAR 1987 (July 1, 1986 - June 30, 1987)					1987-89 BIENNIUM (July 1, 1987 - June 30, 1989) Assumes same revenues and expenditures as 1985-87 biennium.				
	Program Reductions	Staff Cuts Class.[1]	Staff Cuts All[2]	Combination Program Reduction/ Staff Cuts Prog.	Combination Program Reduction/ Staff Cuts Staff[2]	Program Reductions	Staff Cuts Class.	Staff Cuts All	Combination Program Reduction/ Staff Cuts Prog.	Combination Program Reduction/ Staff Cuts Staff
$ 50 Mil.	2.1%	7.7%	4.5%	1.1%	2.2%	1.1%	3.9%	2.2%	0.5%	1.1%
$100 Mil.	4.2%	15.5%	8.9%	2.1%	4.5%	2.1%	7.7%	4.5%	1.1%	2.2%
$150 Mil.	6.4%	23.2%	13.4%	3.2%	6.7%	3.2%	11.6%	6.7%	1.6%	3.3%
$200 Mil.	8.5%	31.0%	17.8%	4.2%	8.9%	4.2%	15.5%	8.9%	2.1%	4.5%
$250 Mil.	10.6%	38.7%	22.3%	5.3%	11.1%	5.3%	19.4%	11.1%	2.7%	5.6%
$424 Mil.	18.0%	65.7%	37.8%	9.0%	18.9%	9.0%	32.9%	18.9%	4.5%	9.5%

1 Classified staff includes merit system (civil service) employees but excludes commissioned state patrol officers, faculty at community colleges and four-year universities, ferry service workers and employees of the legislative and judicial branches.

2 "All" staff includes classified employees and others not covered by merit system employment. Reference to "staff" under the column "Combination Program Reduction/Staff Cuts" means "all" staff.

FIRST STIPULATION RE: EXHIBITS

IN THE SUPERIOR COURT OF THE
STATE OF WASHINGTON
FOR THURSTON COUNTY

NO. 84-2-01900-7

NATIONAL CAN CORPORATION, et al.,

Plaintiffs,

vs.

STATE OF WASHINGTON,
DEPARTMENT OF REVENUE,

Defendant.

FIRST STIPULATION RE: EXHIBITS PERTAINING
TO WASHINGTON STATE BUDGET
AND REVENUES

THE PARTIES hereto stipulate that the following shall be admitted into evidence in this matter:

Exhibit Number	*Exhibit Description*
	Revenue Forecasts
1	1985-1987 Biennium — Revenue Forecast, Gary O'Neil, Director, Research and Information Division, Washington Department of Revenue, March 7, 1984.
2	1985-1987 Revenue Forecast -- Economic Alternatives, Gary O'Neil, Director, Research and Information Division, Washington Department of Revenue, July 6, 1984.

Exhibit Number	*Exhibit Description*
3	General Fund Forecast 1983-1985 Biennium, September, 1984 Forecast compared to June, 1984 Forecast, Research and Information Division, Washington Department of Revenue, September 13 and 14, 1984.
4	1985-1987 Estimates, Donn Smallwood, Chief, Research and Statistics, Washington Department of Revenue, September 26, 1984.
5	Economic and Revenue Forecast for Washington State, Office of the Forecast Council, December, 1984.
6	Economic and Revenue Forecast for Washington State, Office of the Forecast Council, March, 1985.
7	Projected 1983-1985 Revenues and Expenditures, Senate Ways and Means Committee, April 30, 1985.
8	Selected pages from proposed Economic and Revenue Forecast for Washington State, Office of the Forecast Council, June, 1985.
9	Comparison of Projected 1985-1987 Revenues and Expenditures, Senate Ways and Means Committee, May 16, 1985.
10	Projected 1983-1985 Revenues and Expenditures, Senate Ways and Means Committee, May 20, 1985.
	Tax Alternatives
11	Tax Alternatives, Research and Information Division, State of Washington, Department of Revenue, January 15, 1985.

Exhibit Number	*Exhibit Description*
12	Tax Alternatives, Research and Information Division, Washington Department of Revenue, March 29, 1985.
13	Tax Alternatives, Research & Information Division, Department of Revenue, April 3, 1985.
	Tax and Spending Data
14	1984 Tax Exemptions.
15	LEAP Budget Information Charts (3): Washington State, General Fund—State, Biennial Expenditures; Washington State LEAP Budgeting Report—Annual Comparison of TOT Washington State; and Washington State, General Fund—State, Biennial Expenditures—Constant Dollars Per Capita 1973-75 Through 1985-87.
16	Major Tax Rate and Base Reductions Since 1970—Estimated 1985-87 State and Local Impact—Graph and Narrative.
	Budget Data
17	Cover and selected pages from Preliminary Official Statement, dated January 25, 1985, State of Washington, General Obligation Refunding Bonds, Series 1985A.
18	Cover and selected pages from Preliminary Official Statement, dated July 1, 1985, State of Washington General Obligation Bonds.

Exhibit Number	*Exhibit Description*
19	Cover and selected pages from Proposed Revisions to the 1985-87 Operating Budget (State of Washington), Submitted by Governor Booth Gardner, March 1985.
	Revenue Bills
20	Senate Bill Report of Engrossed Substitute Senate Bill No. 4228.
21	Draft fiscal note on ESSB 4228, Erling Johnson, Economic Analyst, Washington Department of Revenue, March 28, 1985.
22	Estimated Impact of ESSB 4228, Research and Information Division, Washington Department of Revenue, April 23, 1985.
23	Governor's veto letter regarding ESSB 4228 dated May 21, 1985.
24	Summary of Proposed Senate Bill No. 3677, Washington Department of Revenue, April 8, 1985.
25	Final Bill Report of Substitute Senate Bill No. 3678.
26	Governor's veto letter regarding SSB 3678 dated April 30, 1985.
	Requests for Stay of Collection
27	Plaintiff's request for stay of collection of taxes at issue.
28	Denial of plaintiff's first request for stay of collection of taxes.
29	Plaintiff's second request for stay of collection of taxes at issue.

30	Denial of plaintiff's second request for stay of collection of taxes.
31	Brief of State of Washington as Amicus Curiae in Support of Appellee [West Virginia].

DATED this 19th day of July, 1985.

BOGLE & GATES
/s/ John T. Piper

KENNETH O. EIKENBERRY
Attorney General

/s/ William B. Collins
Assistant Attorney General

EXHIBIT 4

JOHN SPELLMAN (Seal) DONALD R. BURROWS

Governor Director

STATE OF WASHINGTON
DEPARTMENT OF REVENUE

Date September 26, 1984

To Forecast Council

From Donn Smallwood, Chief, Research & Statistics

RE 1985-1987 Estimates

In response to Representative Grimm's request at the September 14 meeting, the attached table indicates the planning estimates for the 1985-1987 biennium that have been presented to the Council so far. All of the forecasts are based on the "control", or most probable, economic assumption scenario at the time the estimates were prepared.

DS:amd

Attachment

cc: Forecast Work Group

EVOLUTION OF 1985-1987 PLANNING ESTIMATES
GENERAL FUND-STATE
($ MILLIONS)

REVENUE BY SOURCE	Feb., 1984 Forecast	June, 1984 Forecast	Sept., 1984 Forecast
DEPARTMENT OF REVENUE			
RETAIL SALES	$4,769.7	$4,713.7	$4,640.1
BUSINESS & OCCUPATION	1,721.3	1,684.0	1,658.9
USE	381.7	376.0	370.0
PUBLIC UTILITY	294.4	292.3	285.3
LIQUOR SALES	165.0	153.1	153.1
CIGARETTE	188.5	188.5	195.1
PROPERTY (SCHOOLS)	1,113.5	1,114.2	1,120.8

REAL ESTATE EXCISE	298.9	268.2	277.3
TIMBER REVENUE	41.8	44.3	38.6
OTHER	211.7	197.4	197.2
SUBTOTAL	9,186.5	9,031.7	8,936.4
DEPARTMENT OF LICENSING			
MOTOR VEHICLE EXCISE	418.3	428.8	425.6
OTHER	40.2	39.8	46.5
INSURANCE COMMISSIONER			
INSURANCE PREMIUMS	119.4	128.4	128.4
LIQUOR CONTROL BOARD			
EXCESS FUNDS & FEES	58.4	52.9	52.9
BEER & WINE SURTAX	3.0	3.0	3.0
LOTTERY COMMISSION			
LOTTERY REVENUE	265.0	213.3	213.3
STATE TREASURER			
INTEREST EARNINGS	51.1	51.9	51.9
OFFICE OF FINANCIAL MANAGEMENT			
DEBT SERVICE	(402.3)	(404.7)	(405.8)
TUITION	278.8	278.8	278.8
BUDGET STABILIZATION ACCOUNT TRANSFER			
OTHER	76.2	76.2	76.2
TOTAL GENERAL FUND-STATE	$10,062.9	$9,900.1	$9.807.2

*CONTROL ESTIMATE

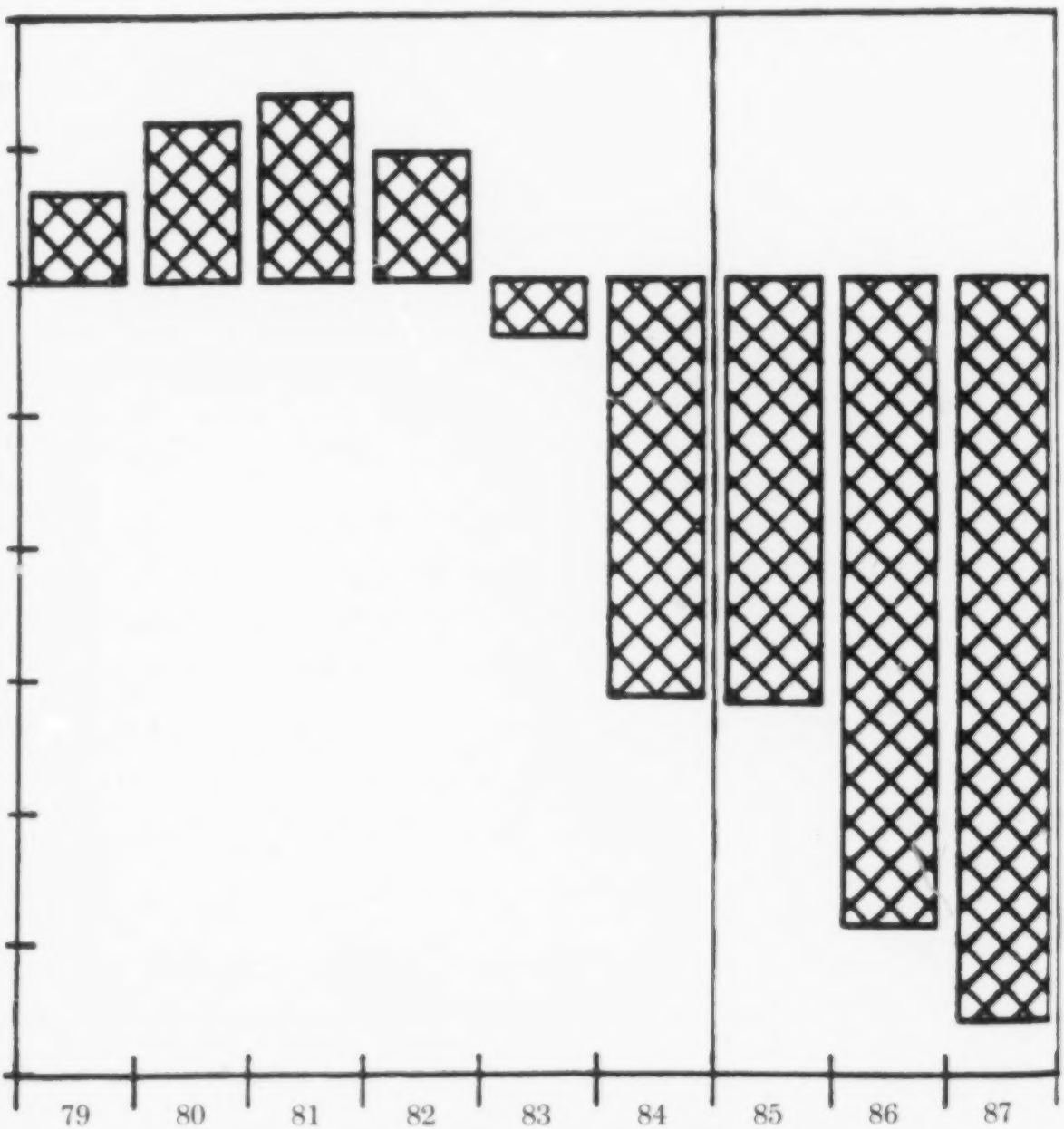
* * *

Research & Information Department of Revenue 24-Sept-84

EXHIBIT 6

ECONOMIC AND REVENUE
FORECAST
For Washington State

U.S. TRADE DEFICIT: SLOWING THE ECONOMY



ECONOMIC AND REVENUE FORECAST COUNCIL

March 1985

(Seal)

STATE OF WASHINGTON

ECONOMIC AND REVENUE FORECAST FOR WASHINGTON STATE

Prepared by
Office of the Forecast Council

OLY.
March 1985

* * *

Preface

The Office of the Forecast Council is required by Chapter 138, Section 1, Laws of 1984 (RCW 82.01, 130) to prepare a quarterly state economic and revenue forecast and submit it to the Economic and Revenue Forecast Council.

The report presents the state's economic and General Fund revenues forecast and provides a background to policymakers for analyzing and planning in their decision-making processes. It is issued four times a year.

Single-copy subscriptions are available to the public free of charge. Mail requests for subscriptions or address changes to: Office of the Forecast Council, State of Washington, AX-02, Olympia, Washington 98504.

Dan McDonald, Chairman
Washington Economic and Revenue
Forecast Council

* * *

Alternative Forecasts

Two alternatives to the Washington State Baseline forecast have been prepared. The Pessimistic scenario calls for a recession during the 1985-87 biennium. In the Optimistic scenario, the current economic expansion continues through the next biennium.

In the Pessimistic scenario, the economy continues to grow during 1985. However, there is no action taken to reduce the federal budget deficit, and by the end of 1985 foreigners begin to reduce their investments in the U.S. The value of the dollar declines, and because of this and the growth of the economy, inflation begins to accelerate. The Federal Reserve is unable to accomodate this combination of strong economic growth and rising inflation, especially when there has been no action taken to reduce the budget deficit. Monetary policy is tightened, and this along with the falling dollar, increased inflation, and large budget deficits drives interest rates sharply higher. A recession occurs in fiscal 1987. The effect of this in Washington is a decline of 0.5 percent in real personal income in fiscal 1987, and a loss of 23,000 jobs. Interest rate sensitive sectors such as lumber and wood products and construction are the hardest hit. Interest rates and the recession have a drastic effect on housing activity in the state. The number of housing units authorized drops from over 31,000 in fiscal 1985 to less than 13,000 in 1987.

In contrast to the Pessimistic scenario, under the Optimistic assumptions everything goes right. Congress passes large budget cuts, and the dollar slides to a more competitive level; the decline is gradual enough to prevent a sharp rise in inflation. The impact of the lower dollar on inflation

is mitigated by OPEC's inability to hold the line on oil prices, which slip to $25 per barrel. Continued low inflation and progress in cutting the deficit permit interest rates to fall, and the economy continues to expand through fiscal 1987. This scenario also implies a strong economy at the state level. Average annual increases in real income and employment are both above three percent during fiscal 1986 and 1987.

A combination of good economic policy and luck is required in the Optimistic scenario: it requires that the deficit be cut sharply; that the financial markets continue to respond to the low inflation rates, allowing interest rates to decline; and that foreign investors, money managers, and central banks take steps to allow the dollar to slide gradually to a more competitive level. Although each of these conditions taken individually is possible, the likelihood that they will all be achieved at once is relatively low.

* * *

Chapter II

Washington State Revenue Forecast

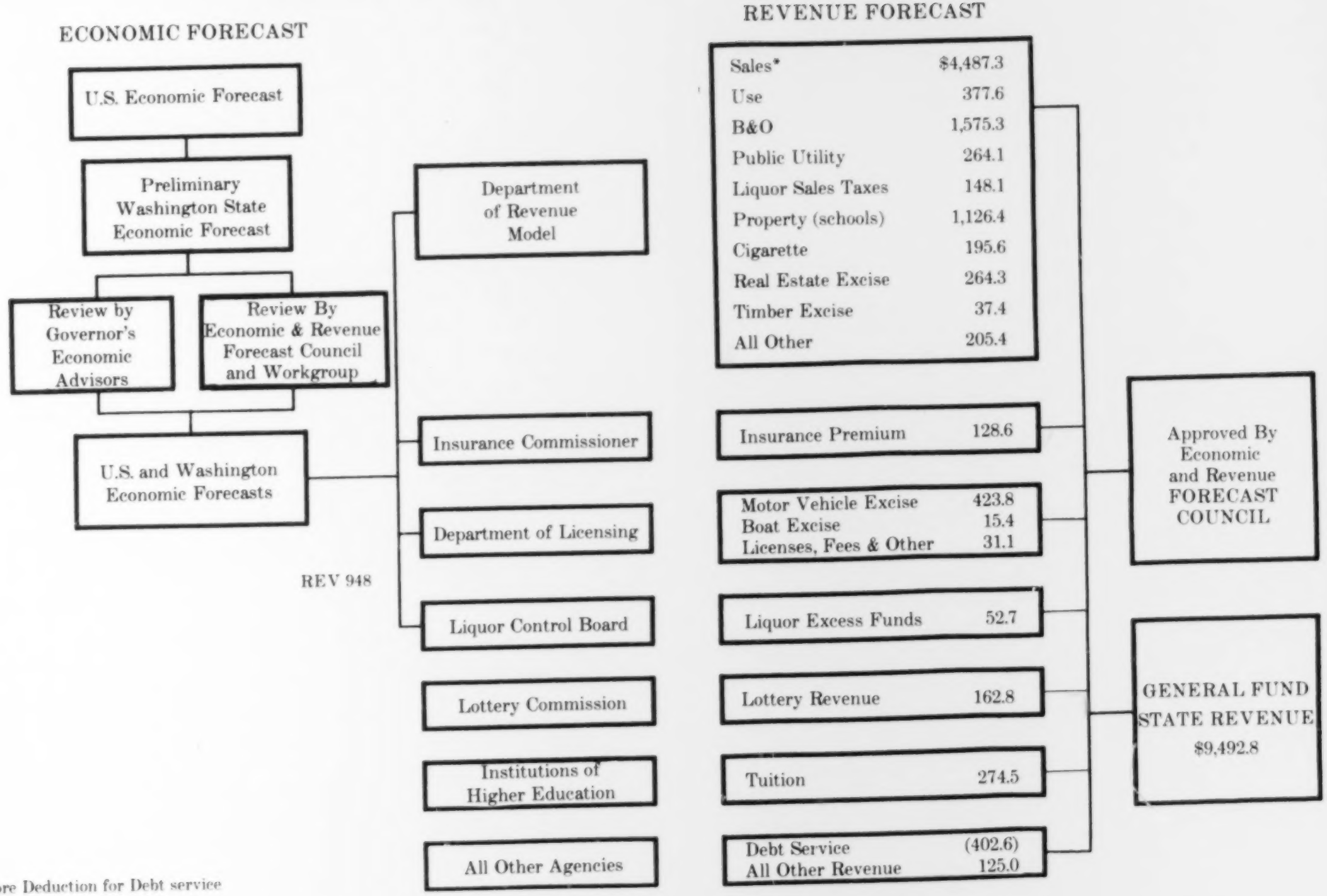
The State General Fund revenue forecast is reviewed and updated quarterly in conjunction with the revised state economic forecast. The March, 1985 forecast for both the 1983-85 and 1985-87 biennia were reviewed and approved by the economic and revenue forecast council, March 18, 1985. This council was created by Chapter 138, Laws of 1984 (RCW 82.01.130) to provide objective revenue estimates for both executive and legislative branches. The Council consists of six members, two appointed by the Gov-

ernor and two appointed by the legislature from each caucus of the Senate and House of Representatives. The members of the Economic and Revenue Forecast Council are listed on the inside front cover.

A flow chart of the forecast process including the March, 1985 baseline forecast for the 1985-87 biennium approved by the Forecast Council is shown in Figure 1.

Each state agency engaged in revenue collection is responsible for preparation of forecasts of its own sources. The staff of the forecast council is responsible for the preparation of the state economic forecast, the revenue forecast of the Department of Revenue's tax sources and the review and coordination of the revenue forecasts of other major revenue collecting agencies. The Office of Financial Management assumes the responsibility of coordinating the forecasts of the 100 or so small state agencies. The state economic forecast updated and reviewed by the Governor's Council of Economic Advisors, forms the basis for the forecast of major state taxes, especially the transaction based taxes such as the retail sales and business and occupation taxes.

FIGURE 1
ECONOMIC AND REVENUE FORECAST FLOW CHART
GENERAL FUND—STATE
1985-87 BIENNIUM
(Amounts in Millions)



*Before Deduction for Debt service

Forecast Change 1985-87

The March forecast for the 1985-87 biennium is $153.6 million below the December, 1984 forecast. The majority of this change is in Department of Revenue sources ($139.2 million) primarily the retail sales, use and business and occupation taxes. The 1985-87 forecast of other agencies was reduced $14.4 million from the December forecast. Table II provides a comparison of the March and December forecasts for 1985-87 by agency. Table III presents the March, 1985 baseline forecast for 1985-87 by fiscal year and by major revenue source.

The primary factors contributing to the $153.6 million reduction in the forecast for 1985-87 are: a lower base in the 1983-85 biennium, lower inflation than expected in December, a stronger real economy, which only partly offsets the negative impact of lower inflation, the expiration of the business and occupation surtax on retailing activity, and adjustments in the other agency revenues. These are summarized below.

Elements of Change

—Lower Base in 1983-85 ($-46.8 million)

—Lower inflation ($225.1 million)

—Stronger real growth (+160 million)

—Expiration of B&O retailing surtax ($-27.3 million)

—Adjustments in the other agency revenues ($-14.4 million)

TOTAL ($-153.6 million)

Collection experience in the last few months of the 1983-85 biennium (October, 1984 - January, 1985 activity periods) indicates that revenues are about two percent below the level expected in December. This lower base is assumed to carry forward to 1985-87 and reduces the 1985-87 estimate by $46.8 million.

The March, 1985 economic forecast assumes that inflation will be much less than expected in the December forecast. The overall price level is 2.3 percent below the December forecast and wholesale prices and the price levels of most consumer durables are 4-5 percent below the level expected in December. The impact of inflation reduces the 1985-87 forecast by an estimated $225.1 million. The March forecast for the real economy is stronger than anticipated in December, offsetting part of the negative impact of lower inflation on revenues. Real personal income is 2.3 percent above the December forecast and employment levels are 1.6 percent higher than December. Overall the lower inflation and the lower base more than offset the improved real economy.

The 1985-87 biennium forecast has been reduced by an additional $27.3 million because the business and occupation seven percent surtax on retailing activity is assumed to expire June 30, 1985 under current law. (See assumptions section).

Other agencies reduced their forecasts for 1985-87 by $14.1 million. Positive adjustments for interest earnings, liquor profits, tuition and debt service were more than offset by lower projections for lottery and motor vehicle excise tax revenue.

The State Treasurer's forecast for interest earnings for 1985-87 was increased by $4.3 million. This increase is

based upon a revised assumption that the average daily investible balance will be at approximately the current level. The tuition forecast is $4.0 million higher than the December forecast due to technical adjustments. The liquor profits forecast is $2.5 million above December's forecast. The Liquor Board assumes a decrease in sales of about 3 percent below the fiscal 1985 level and an increase in profits of about $1.5 per 750 ML of spirits, due to the increase in the Federal excise tax on liquor scheduled October, 1985. The debt service requirements for 1985-87 were reduced by $8.4 million. This saving reflects a decrease in bond sales and interest rates from what was expected in December.

The Department of Licensing reduced their forecast for motor vehicle excise tax by $0.9 million per year for 1985-87. This is a very small adjustment (less than 0.5 percent) and primarily reflects current experience. The most significant change for other agencies was the lottery estimate. The lottery's forecast was reduced by $34 million tor 1985-87. The on-line sales forecast (lotto) was actually increased by $10.4 million however, this was more than offset by a $44.4 million reduction in the instant games forecast.

Alternative Forecast: 1985-87

Two alternative revenue forecasts for state General Fund revenues were prepared: one based on a more optimistic economic scenario than the baseline economic forecast and one assuming a more pessimistic outlook.

Under the optimistic scenario everything goes right for the economy. Real growth for both the nation and Washington State is strong, interest rates fall and inflation is moderate. The pessimistic scenario assumes that interest rates move higher and the economy slips into a recession in 1986. The

summary of the economic forecast in Chapter I provides more detail for these scenarios.

Table IV shows the revenue implications of the optimistic and pessimistic economic forecasts. The optimistic scenario generates $9,948.3 million during the 1985-87 biennium. This is $455.5 million above the baseline forecast. Under the pessimistic alternative, General Fund state revenues total $9,054.3 million in the 1985-87 biennium this is $438.5 million below the baseline forecast.

* * *

Table IV

March, 1985 Alternative Forecasts Compared
to March, 1985 Baseline Forecast
1985-87 Biennium
($ Millions)

Agency/Source	March, 1985 Optimistic Forecast	March, 1985 Baseline Forecast*	March, 1985 Pessimistic Forecast
Department of Revenue			
Retail Sales	$ 4,727.8	$ 4,487.3	$ 4,241.1
Business and Occupation	1,611.6	1,575.3	1,527.9
Use	407.2	377.6	352.4
Public Utility	265.3	264.1	260.4
Real Estate Excise	357.7	264.3	184.6
Property	1,132.7	1,126.4	1,120.1
Other	605.0	586.5	569.1
Subtotal	$ 9,107.3	$ 8,681.5	$ 8,255.6
Department of Licensing	483.3	470.3	457.7
Insurance Commissioner[1]	128.6	128.6	128.6
Lottery Commission	180.0	162.8	155.0
Treasurer Interest Earnings	38.1	56.2	76.9
Liquor Profit/Fees[2]	57.3	55.6	54.0
Office of Financial Management			
Debt Service	(396.9)	(402.6)	(403.4)
Tuition	281.1	274.5	267.7
Other	69.5	65.9	62.2
TOTAL			
General Fund-State	$9,948.3	$9,492.8	$9,054.3
Difference from Baseline	$455.5	.....	$ -438.5

[1]Insurance Premiums

[2]Includes Beer/Wine Surtax

CG:smb
03-25-85
85036K2

* * *

EXHIBIT 8

Table I

General Fund State Revenue
Comparison of June, 1985 Forecast to March 18, 1985
Forecast 1985-87 Biennium
(Amounts in Millions)

Agency	March 18, 1985[1]	June, 1985[2]	Difference
Department of Revenue	$ 8,681.5	$ 8,438.6	$ -242.9
Other Agencies	811.3	832.8	21.5
Total General Fund*	$ 9,492.8	$ 9,271.5	$ -221.3

[1]Approved by the Economic and Revenue Forecast Council, March 18, 1985.

[2]Based on current law. Includes impact of legislation enacted during the 1985 regular legislative session.

*Detail may not add due to rounding.

Office of the Forecast Council
850510M1
05-29-85

Table II

Department of Revenue General Fund Forecast
1985-87 Biennium
June, 1985 Forecast Compared to March, 1985 Forecast
$000

Source	March, 1985 Forecast-#1	Legislative Adj-#2	Forecast Change	June, 1985 Forecast	Total Change
Retail Sales	$4,487.3	($ 5.2)	($179.7)	$4,302.4	($184.9)
Business & Occupation	1,575.3	9.4	(59.1)	1,525.7	($50)
Use	377.6	(0.3)	(2.7)	374.6	($3)
Public Utility	264.1	8.0	23.7	295.9	$32
Tobacco Product	11.8		0.4	12.1	$0
Conveyance	23.7		(1.1)	22.5	($1)
Penalty & Interest	53.8		(0.3)	53.5	($0)
Revenue Act Subtotal	$6,793.6	$11.9	($218.9)	$6,586.6	($207.0)
Liquor	148.1		(7.1)	141.0	(7.1)
HUD Privilege	41.6		1.0	42.6	1.0
Cigarette	195.6		0.0	195.6	0.0
Property (Schools)	1,126.4		0.0	1,126.4	0.0
Other Property	12.8		(.0)	12.8	(.0)
Inheritance/ Estate	23.4		0.0	23.4	0.0
Leasehold	15.5		(0.2)	15.3	(0.2)
Fish	4.3	(0.4)	(.0)	3.9	(0.4)
Real Estate Excise	264.3		(30.7)	233.6	(30.7)
Public Timber	0.0		0.0	0.0	0.0
Other	18.6		1.3	20.0	1.3
On Revenue Act Subtotal	1,850.6	(0.4)	(35.6)	1,814.6	(35.9)
Private/Public Timber Distributions	37.4		$0	37.4	$0
Total General Fund Impact	$8,681.6	$11.5	($254.4)	$8,438.6	($242.9)

[1]Approved by the Forecast Council March 18, 1985.

[2]Legislation enacted during the 1985 regular Legislative session.

Office of Forecast Council
Department of Revenue
31-May-85

* * *

Table II

General Fund State Revenue—Other Agencies
Comparison of June, 1985 Forecast to March 18, 1985 Forecast
1985-87 Biennium
(Amounts in Millions)

Source/Agency	March 18, 1985 Forecast	Legislative Changes	Forecast Changes	June, 1985 Baseline	Total Changes
Department of Licensing					
Motor Vehicle	$423.8	—	9.4	433.2	9.4
Other	46.5	1.1	-.1	47.5	1.0
Insurance Commissioner					
Insurance Premiums	128.6	—	2.1	130.7	2.1
Liquor Control Board					
Liquor Profits and Fees	52.7	—	-3.0	49.7	-3.0
Beer & Wine Surtax	2.9	—	—	2.9	—
Lottery Commission					
Lottery Revenue	162.8	—	—	162.8	—
State Treasurer					
Interest Earnings	56.2	—	-2.4	53.8	-2.4
Office of Financial Management					
Debt Service	(402.6)	—	10.5	(392.1)	10.5
Tuition	274.5	—	-9.5	265.0	-9.5
Budget Stabilization Account Transfer	—				
Other	65.9	1.4	11.9	79.2	13.3
Total General Fund—State	$811.3	2.5	19.0	832.8	21.5

*Detail may not add due to rounding.

Office of the Forecast Council
50510N1
05-29-85

* * *

Table 1

General Fund State Revenue
Comparison of June, 1985 Baseline with Alternatives
1985-87 Biennium
$ Millions

Agency	Optimistic	Baseline	Pessimistic
Department of Revenue	$8,817.2	$8,438.6	$7,959.4
Other Agencies	869.1	832.8	782.9
TOTAL General Fund	$9,686.3	$9,271.5	$8,742.3
Difference from Baseline	$ 414.5		$ -529.2
Difference from March 18, 1985	$ 193.5	$ -221.3	$ -750.5

Office of the Forecast Council
850510R1
05-30-85

* * *

EXHIBIT 13

Alternative	Tax Alternatives ($Millions) 1983-85 Biennium*	1985-87 Biennium**
Base Extensions		
1 Sales Tax on Motor Vehicle Fuel		
Including State & Federal Tax	—	$ 375.0
Excluding State & Federal Tax	—	295.0
2 Sales Tax on Selected Services	$ 32.2	772.3
3 Eliminate B&O Exemption—Direct Sellers	.3	6.8
4 Eliminate WHSL Functions (B&O) Exemption—Grocers	.2	4.8
5 Extend Pub Util Tax to Garbage, Sewer	.4	10.2
6 Eliminate Sales Tax Exemption—Res Local Phone Service	.9	23.8
Tax Rate Increases		
1 B&O Surtaxes—Nonservice		
+25%	.9	22.4
+50%	1.7	44.1
+75%	2.6	66.6
+100%	3.5	89.2

2 Service Rate		
+.1	1.3	32.5
+.5	6.3	160.3
+1.0	12.8	324.7
3 Sales Tax		
+.1	2.5	67.0
+.3	7.5	200.7
+.5	12.3	333.6
+.7	17.2	466.0
+1.0	24.5	663.5
4 Real Estate Excise		
1.14%	.7	17.3
1.25%	1.8	44.5
1.50%	4.4	106.2
1.75%	7.0	168.0
2.0%	9.6	229.7
5 Conveyance Tax		
1.14%	.1	1.6
1.25%	.2	4.0
1.50%	.4	9.5
1.75%	.6	15.0
2.00%	.9	20.6
6 Insurance—Raise Domestic Rate to Equal Foreign	—	13.6
7 Estate Tax—Federal Ex. Levels, Rates 50% Higher	—	7.8
8 State Prop. Tax Levy—Raise 106% to 110%	—	28.7***
9 State Prop. Tax Levy—Raise From $3.60 to $4.00	—	139.2***
10 Cigarette Tax—Increase Rate 8 Cents	—	64.0
New Taxes		
Intangibles (1%)	—	20.0
1% Tax on Gross Income—Bus. & Indiv.	—	1,800.0***
Reinstate Inheritance Tax	—	88.5

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*-Effective May 1, 1985

**-Effective June 1, 1985

***-18 Months

RESEARCH & INFORMATION DIVISION
DEPARTMENT OF REVENUE

03-APR-85

BEST AVAILABL

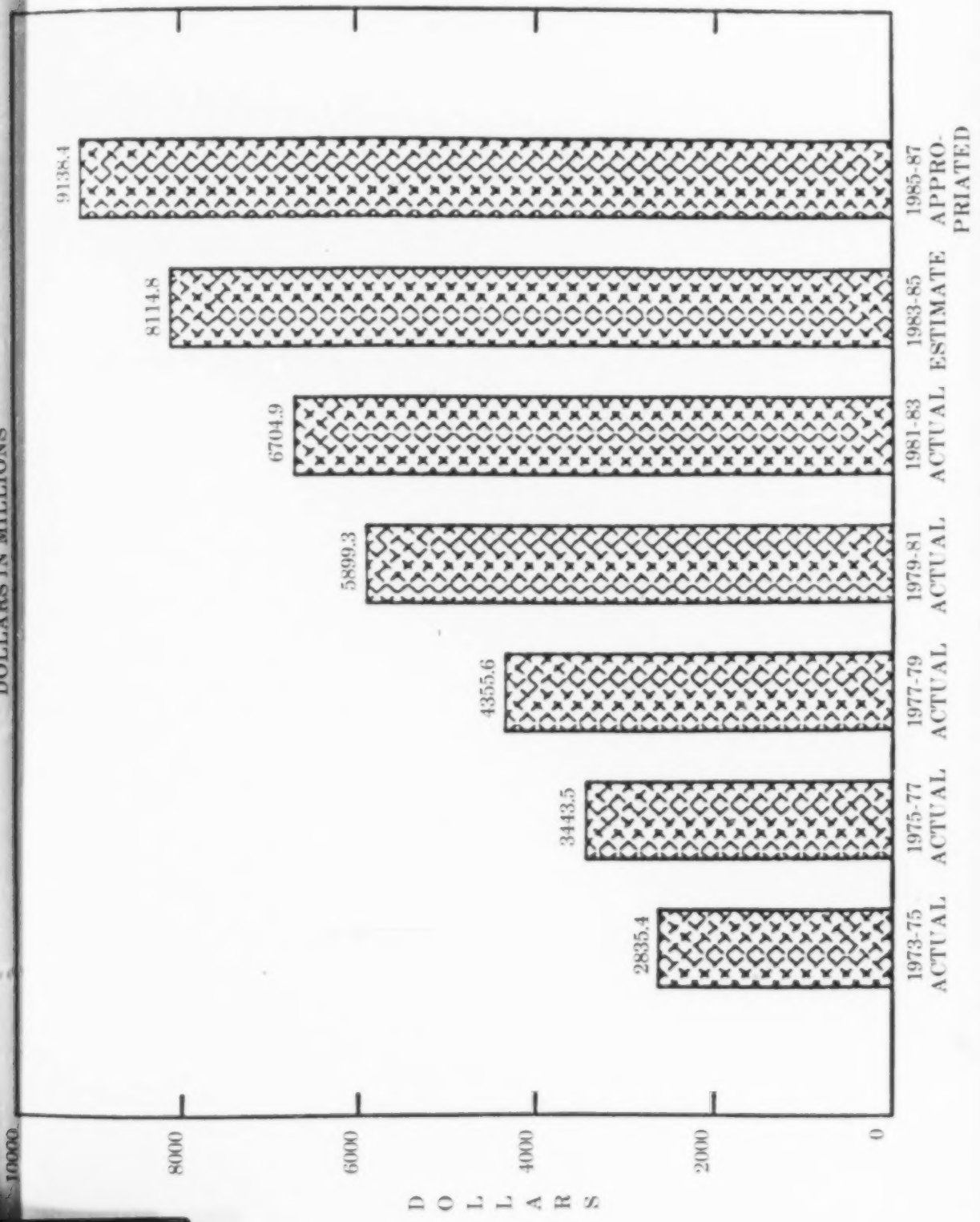
(SEAL
LEAP OFFICE)

07/05/85

09:09

EXHIBIT 15

WASHINGTON STATE
GENERAL FUND-STATE
BIENNIAL EXPENDITURES



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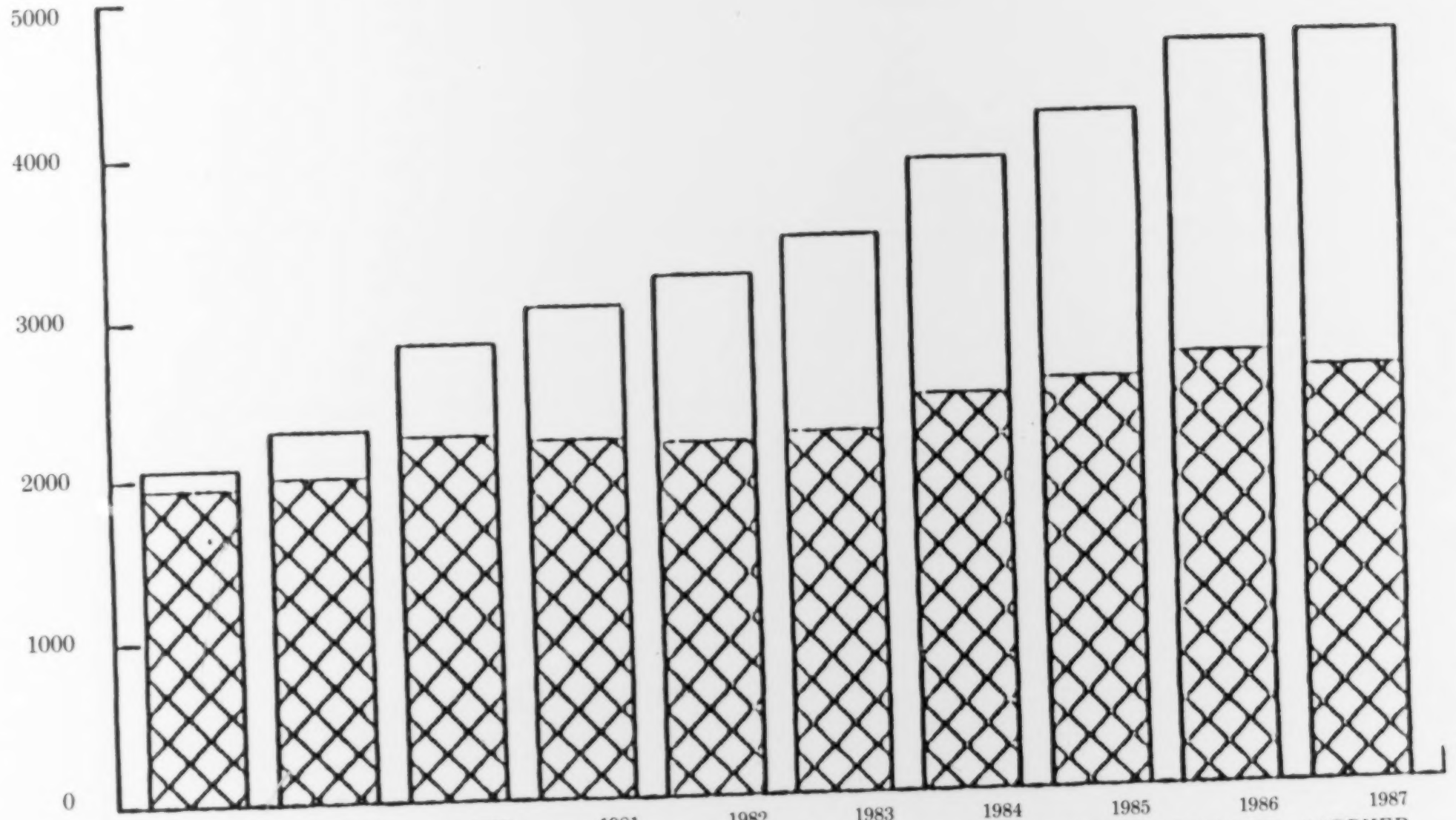
Date 04/01/85
Time 11:23

WASHINGTON STATE
LEAP BUDGETING REPORT
ANNUAL COMPARISON OF
TOT WASHINGTON STATE

GENERAL FUND-STATE
ACTUAL AND CONSTANT IPD(FY1977-BASE) DOLLARS IN MILLIONS



	1978 ACTUAL	1979 ACTUAL	1980 ACTUAL	1981 ACTUAL	1982 ACTUAL	1983 ACTUAL	1984 ACTUAL	1985 ESTIMATE	1986 GARDNER	1987 GARDNER
ACTUAL $	2,060.2	2,295.4	2,837.4	3,061.8	3,239.7	3,465.2	3,928.6	4,206.5	4,637.9	4,686.1
CONSTANT $	1,941.2	2,000.0	2,253.3	2,215.8	2,184.6	2,232.1	2,451.3	2,535.9	2,688.5	2,575.1

The difference between actual and constant dollars is solely inflation.
It does not depict population increases, court decisions, and older average age.

WASHINGTON STATE GENERAL FUND-STATE BIENNIAL EXPENDITURES
CONSTANT DOLLARS PER CAPITA 1973-75 THROUGH 1985-87

DATE 07/02/85

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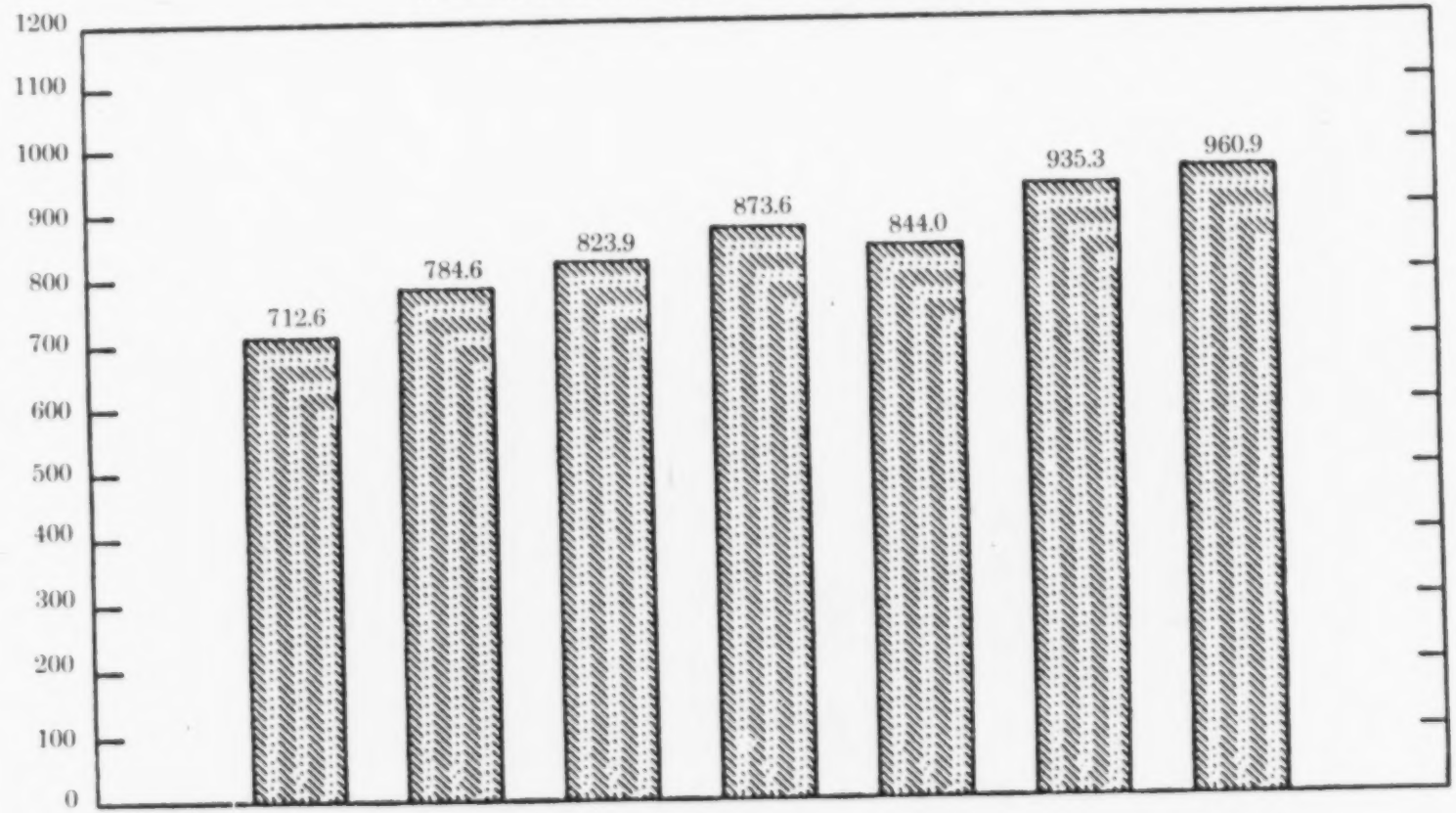
IPD USED AS A DEFLATOR BASE YEAR-1974



% CHANGE	10.1	5.0	6.0	-3.4	10.8	2.7
% GROWTH (CUMULATIVE)	10.1	15.6	22.6	18.4	31.3	34.8

EXHIBIT 16

MAJOR TAX RATE AND BASE REDUCTIONS SINCE 1970

ESTIMATED STATE AND LOCAL IMPACT FOR 1985-87 BIENNIUM

(DOLLARS IN THOUSANDS)

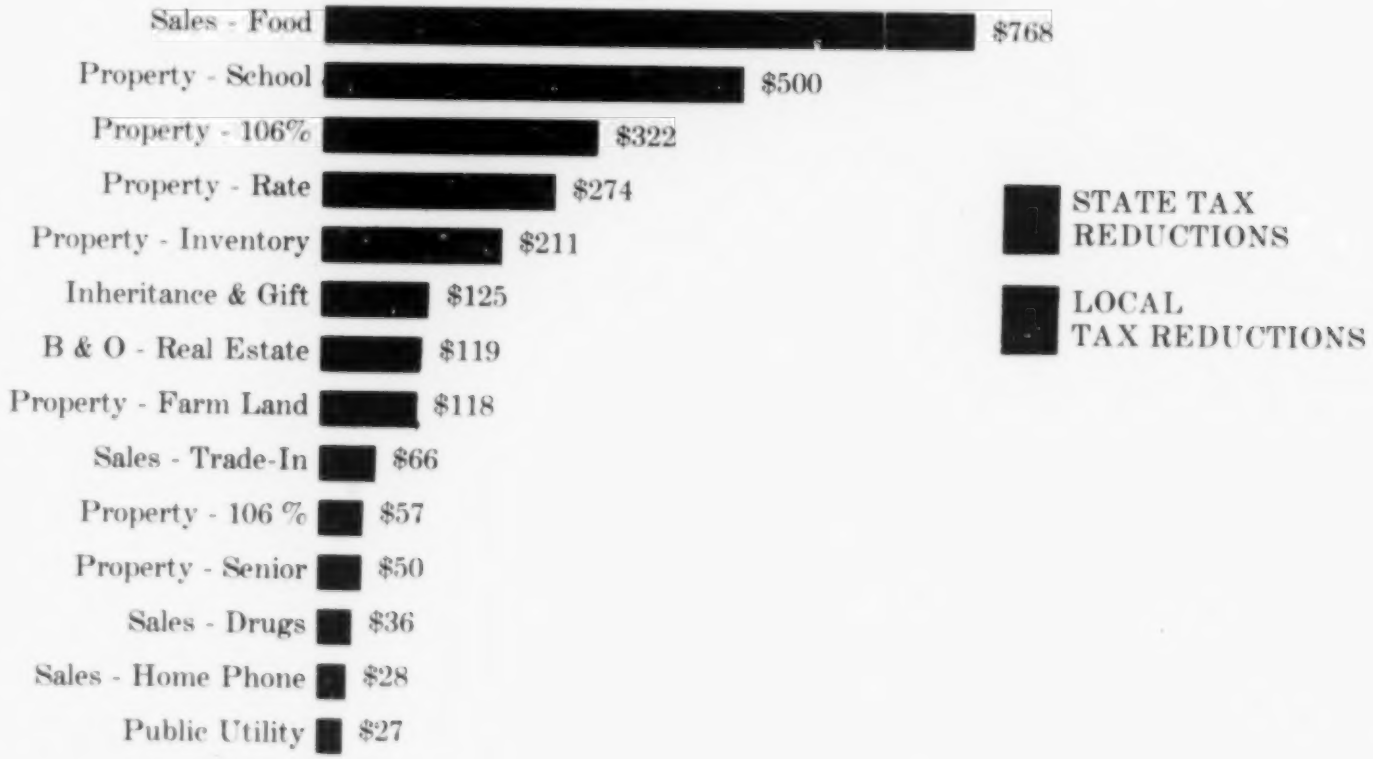
Tax Reduction (Year Effective)	State	Local	Total
Property Tax[1]			
106 Percent Limit On Regular Levies:			
Local Levies (1974)	$	$ 322	$ 322
State School Levy (1979)	57	.....	57
10 Percent Reduction In Statutory Levy Rates (1975)	125	149	274
Limitation Of Special M&O School Levies (1977)	.....	500	500[2]
Senior Citizens Exemption (1971, Last Expanded In 1983)	13	37	50
Current Use Assessment Of Farm Land (1973)	40	78	118
Exemption Of Business Inventories (1984-B&O Credit Since 1974)	67	144	211

[1] Because of the 106 percent limit, property tax exemptions do not always reduce taxing district revenues by the amount indicated; the impact is often shifted to remaining taxpayers.

[2] Special levies subject to voter approval. Based on historical success patterns, projected special levies would have been $400 to $600 million higher if the limitation were not imposed.

Tax Reduction (Year Effective)	State	Local	Total
Retail Sales Tax			
Exemption For Food Products Consumed Off-Premises (1978)	652	116	768
Exemption For Prescription Drugs (1974)	30	6	36
Exemption For Local Residential Telephone Service (1983)	24	4	28
Exemption For Trade-Ins Of Like-Kind Items (1984)	66	.....	66
Other			
B&O Deduction For Real Estate Loans (1970)	119	.....	119
Repeal Of Inheritance And Gift Taxes (1982)	125	.....	125
Public Utility Deduction For Renewable Energy Resources (1980)	27	.....	27
Total Biennial Savings To Taxpayers	$1,345	$1,356	$2,701

MAJOR TAX RATE AND BASE REDUCTIONS SINCE 1970 — $2,701 MILLION TOTAL
Estimated 1985-87 State and Local Impact



Figures in Millions of Dollars
Total State Reductions - $1,345 Million
Total Local Reductions - $1,356 Million

MAJOR TAX RATE AND BASE REDUCTIONS SINCE 1970
Estimated State and Local Impact for 1985-87 Biennium

Tax Reduction (Year Effective)	Amount ($000,000)
Property Tax[1]	
106% limit on regular levies:	
local levies (1974)	322
state school levy (1979)	57
10% reduction in statutory levy rates (1975)	274
Limitation of special M&O school levies (1977)	500[2]
Senior citizens exemption (1971, last expanded in 1983)	50
Current use assessment of farm land (1973)	118
Exemption of business inventories (1984—B&O credit since 1974)	211
Retail Sales Tax	
Exemption for food products consumed off-premises (1978)	768
Exemption for prescription drugs (1974)	36
Exemption for local residential telephone service (1983)	28
Exemption for trade-ins of like-kind items (1984)	50
Other	
B&O deduction for real estate loans (1970)	119
Repeal of inheritance and gift taxes (1982)	125
Public utility deduction for renewable energy resources (1980)	27
TOTAL BIENNIAL SAVINGS TO TAXPAYERS	$ 2,685

[1] Because of the 106% limit, property tax exemptions do not always reduce taxing district revenues by the amount indicated; the impact is often shifted to remaining taxpayers.

[2] Special levies subject to voter approval. Based on historical success patterns, projected special levies would have been $400 to $600 million higher if the limitation were not imposed.

Research & Information
Department of Revenue
May 20, 1985

* * *

EXHIBIT 18

PRELIMINARY OFFICIAL STATEMENT, DATED JULY 1, 1985

(This is a Preliminary Official Statement, subject to correction and change. This Preliminary Official Statement does not constitute an offer to sell nor the solicitation of an offer to buy in any jurisdiction in which it is unlawful to make such offer, solicitation or sale.)

In the opinion of Bond Counsel, interest on the Bonds is exempt from federal income taxes under existing federal law and rulings.

(SEAL)

$230,440,000*
STATE OF WASHINGTON
GENERAL OBLIGATION BONDS

Dated: August 1, 1985 Due: September 1, as shown below

The Bonds are general obligations of the State to which the full faith, credit and taxing power of the State is unconditionally pledged. The Bonds maturing September 1, 1996 and thereafter are subject to redemption beginning September 1, 1995 at par, plus accrued interest to the date of redemption.

The Bonds of each series are issuable in fully registered form in the denomination of $5,000 or any integral multiple thereof.

Interest on the Bonds is payable on March 1, 1986 (seven months) and semiannually thereafter on each September 1 and March 1.

Amounts of Maturities

Year	Amount of Maturities Due September 1	Rate	Yield or Price	Year	Amount of Maturities or Mandatory Redemption Due September 1	Rate	Yield or Price
1986	$ 5,590,000	%	%	1999	$14,965,000	%	%
1987	6,830,000			2000	16,055,000		
1988	7,225,000			2001	17,250,000		
1989	7,645,000			2002	4,420,000**		
1990	8,145,000			2003	4,835,000**		
1991	8,660,000			2004	5,270,000**		
1992	9,255,000			2005	5,760,000**		
1993	9,895,000			2006	6,270,000**		
1994	10,570,000			2007	6,860,000**		
1995	11,310,000			2008	7,485,000**		
1996	12,125,000			2009	8,165,000**		
1997	13,005,000			2010	8,915,000**		
1998	13,935,000						

(Plus accrued interest)

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*Subject to change.

**Subject to optional bidder designation of Term Bonds, in which case the amounts shown may be retired by mandatory redemption. See Official Notice of Sale and Description of the Bonds herein.

The Bonds are offered when, as and if issued, subject to approval of legality by Messrs. Bogle & Gates, Seattle, Washington, Messrs. Perkins Coie, Seattle, Washington, Messrs. Preston, Thorgrimson, Ellis & Holman, Seattle, Washington, Messrs. Riddell, Williams, Bullitt & Walkinshaw, Seattle, Washington or Messrs. Roberts & Shefelman, Seattle, Washington, Bond Counsel, and certain other conditions.

July , 1985

* * *

Washington's 1984 unemployment rate of 9.5% exceeded the U.S. rate of 7.5%. However, because of the industrial mix of the economy, the State's unemployment rate has generally been higher than the national rate. The State's April 1985 seasonally adjusted unemployment rate was 8.8%.

Budgetary Controls

The State operates on a July 1 to June 30 fiscal year and on a biennial budget basis, the constitutionally prescribed fiscal period. The current biennium will end June 30, 1985. State law requires a balanced biennial budget. Furthermore, whenever it appears that expenditure of appropriated funds will exceed revenues, the Governor is required to reduce expenditures of appropriated funds. To assist in its financial planning, the State prepares quarterly econometric forecasts which are derived from national econometric models. The legislature, through enactment of ESHB No. 1083 in 1984, established the Economic and Revenue Forecasting Council in the Department of Revenue. This Council consists of six members, two appointed by the Governor, and two appointed from each of the political caucuses of the Senate and House of Representatives. The Council approves the official revenue forecast for the State of Washington.

Revenues and Expenditures

State taxes include excise taxes and ad valorem property taxes; the State Constitution, as interpreted by the State Supreme Court, prohibits the imposition of net income taxes. The principal excise taxes which support the State's General Fund are the retail sales tax and the business and occupation tax. Excise taxes on motor fuels

are dedicated to supporting highway and road construction and maintenance. The level of revenues generated by both the retail sales tax and the business and occupation tax is very sensitive to changes in disposition of personal income making it difficult accurately to forecast revenue receipts. From 1976 to 1979 those tax revenues increased substantially faster than personal income. From 1980 to 1982, growth in those tax revenues significantly lagged increases in income, resulting in the necessity for reduced expenditures, increased taxes, and deferred retirement fund payments in the 1981-83 biennium. The increase in fiscal 1983 exceeded the growth in personal income due in part to legislative enacted tax rate increases and a temporary extension of the sales tax base to include food for home consumption. Due to a stronger State economy in Fiscal Year 1984, retail sales and business and occupation tax revenues increased more rapidly than personal income. Growth in the retail sales tax and the business and occupation tax is projected to lag personal income growth in Fiscal Years 1986 and 1987, after adjustments have been made to offset the affect of the elimination of the "twenty-fifth month" in the 1983-85 biennium.

1983-85 Biennium

The 1983-85 Biennium ended June 30, 1985. The most recent revenue and economic forecast approved by the Revenue and Economic Forecast Council in June 1985 estimates total General Fund revenues at $9,976.5 million including private-local and federal funds. Subsequent to the June 1985 forecast, changes in federal and private-local reimbursement increased revenues by $37.3 million,

to a biennial total of $10,013.8 million. The official revenue forecast for the general fund-state portion was $8,107.2 million. After legislative changes, however, the General Fund-State estimate is $8,109.2 million. Combined retail sales and business and occupation revenues are approximately 36.7 percent and 12.4 percent, respectively, of the total General Fund.

Total General Fund expenditures are estimated at $10,019.3 million. Approximately 51.6% of this amount is for education and 37.1% for human resources.

1985-87 Biennium

The 1985-87 budget passed in June 1985 was based on the June economic and revenue forecast approved by the Economic and Revenue Council. After revisions resulting from legislative action and revised collection procedures, current revenue estimates are $9,314.9 for General Fund-State, and $11,442.1 for the total General Fund, including the federal and private-local portion, representing increases of 14.9 percent and 14.3 percent, respectively.

Of total general fund expenditures of $11,267.0 million, approximately 52.8 percent is for education and 37.3 percent for human resources. The anticipated ending fund balance is $175.1 million.

The 1985-87 Capital budget funds the first two fiscal years (FY 1986 and 1987) of the State's "Six Year Facility and Capital Plan." The budget contains $588 million from all funds to support more than 350 projects in all areas of state government. Education programs will receive $420 million or 71.4 percent of all capital funds and human resources will receive $75 million or 12.7 percent.

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Litigation Potentially Affecting Future Expenditures and Revenues

The United States Federal District Court for Western Washington has recently held in a "comparable worth" lawsuit that the State of Washington had discriminated and continues to discriminate against women employees of the State in violation of Title VII of the Federal Civil Rights Act. The State has appealed the court's decision.

The Office of Financial Management estimates that the financial impact on the State of the legal position originally proposed by the plaintiffs would have been in excess of $900 million. In a January 10, 1984 ruling the district court denied some of the plaintiffs' requests for damages (including interest on back pay of approximately $125 million) and granted others. A preliminary estimate by the Office of Financial Management of the financial impact on the State if the ruling were affirmed on appeal is approximately $377 million, of which approximately $95 million would be current salary costs for the 1983-85 biennium. The balance would be back pay and associated pension funding requirements. Both the State and the plaintiffs have appealed the district court decision. On March 5, 1984, the State was granted a stay of payments on the decision by the U.S. Ninth Circuit Court of Appeals, pending outcome of appeal. The State estimates that approximately 66% of any payments which may be due as a result of such litigation would be payable from the General Fund and the balance from other State funds.

The budget for the 1985-87 biennium appropriates $45.9 million for implementation of comparable worth salary increases. The expenditure of $41.4 million out of

this appropriation, however, is contingent upon settlement of the litigation.

In addition, in December 1984, tax refund suits were brought against the State of Washington by more than 170 manufacturers and out-of-state manufacturers selling products in Washington, alleging the unconstitutionality of Washington's manufacturing, wholesaling, and retailing business and occupation tax as applied to these businesses. The refund claims are based upon the recent ruling of the United States Supreme Court in *Armco, Inc. v. Hardesty,* — U.S. —, 81 L.Ed.2d 540 (1984), holding that West Virginia's wholesaling business and occupation tax discriminated against out-of-state manufacturers selling in that state.

Claims in litigation and administrative requests for refund filed with the Washington State Department of Revenue currently approximate $96 million for the period 1980-84. The State anticipates additional refund claims in 1985 with respect to tax years 1981-84, not foreclosed by the statute of limitations.

On June 24, 1985, the Thurston County Superior Court denied the claims for refund and upheld application of the tax. Because of the nature of the issues in the litigation an appeal to the Washington State Supreme Court, and thereafter to the United States Supreme Court, is probable.

If damages ultimately are assessed against the State as a result of the "comparable worth" lawsuit or refunds are ordered in the tax litigation, the State could, among other things, reduce expenditures on services, reduce the number of its employees, restrict the number of new em-

ployees hired, defer employee salary increases, increase user fees and license taxes, use any existing general fund surplus or raise certain taxes. Tax refunds would be payable from the General Fund.

For a further discussion of these lawsuits, see "Litigation" herein.

* * *

LITIGATION

There is not now pending any litigation restraining or enjoining the sale, issuance, execution or delivery of the bonds or in any other manner affecting the validity of the bonds or the proceedings or authority pursuant to which they are to be sold and issued.

At any given time, including the present, there are numerous lawsuits pending against the State of Washington which would, if successful, affect the state's revenues or expenditures. The Attorney General of the state is of the opinion, however, that with certain exceptions below noted, no pending suits within that category would, if successful, have a material adverse effect on either state revenues or expenditures:

(1) *"Comparable Worth" Litigation:*

The first exception involves a "Comparable Worth" suit brought by the Washington Federation of State Employees in the United States District Court. The lawsuit, which is the first such lawsuit brought against any state, claims that the State of Washington pays less to employees in certain job categories held predominantly by women than to those employees in different job categories held predominantly by men and regarded as comparable.

On December 14, 1983, the district court entered its decision finding that the State of Washington was thus discriminating. Based on that finding the court awarded the plaintiffs both prospective relief and back pay, but denied their request for prejudgment interest in the approximate amount of $125 million. The estimated cost of the award, if sustained on appeal, would be approximately $375 million—compared to the approximately $960 million which the plaintiff union initially sought.

Both the state and the union then appealed the decision of the district court to the Ninth Circuit Court of Appeals. On March 5, 1984, the appellate court accepted jurisdiction of the case as appealed, and it further granted the state's request for a stay of the district court's decision. Accordingly, the state is not now required to change its compensation system or to pay any monies as ordered by the district court pending appeal. The case was orally argued before the Court of Appeals on April 4, 1985 and is now under advisement. Considering the novelty of the lawsuit, the state believes that it will be ultimately appealed to the United States Supreme Court by whichever party is unsuccessful before the Ninth Circuit Court of Appeals.

(2) *Business and Occupation Tax—Interstate Commerce Challenge:*

During the last week of December, 1984, suits were commenced in the Thurston County (Washington) Superior Court by a large number of Washington manufacturing firms as well as several out-of-state manufacturers selling their products in Washington. Those suits challenged the constitutionality of Washington's business and

occupation tax as applied to (a) Washington manufacturers who sell their products elsewhere and (b) out-of-state manufacturers who sell their products in Washington. The cases are based upon the Commerce Clause of the United States Constitution as recently construed and applied by the United States Supreme Court in the *Armco* case (*Armco v. Hardesty,* — U.S. —, 81 L.Ed.2d 540 (1984)) out of West Virginia. The plaintiffs, at this time, are seeking a refund of business and occupation taxes paid since 1980. According to the most recent Department of Revenue estimates the total potential recovery by the plaintiffs, and others similarly situated should they also elect to sue, would be in the neighborhood of $248 million with respect to the tax on manufacturing and approximately $176 million should the tax on out-of-state manufacturers selling their products in Washington also be invalidated. The principal cases were consolidated for argument before the Thurston County Superior Court. On June 24, 1985, that court issued a memorandum opinion denying the refunds and upholding both applications of the tax. This matter, likewise, is one which will quite probably involve, ultimately, an appeal to the United States Supreme Court for final resolution. It should also be noted, however, that a bill was enacted by the recently adjourned state legislature which is designed to reduce the potential level of state liability in this area. *See* "1985 Legislative Changes."

(3) WPPSS *Bondholders Suit:*

In late November of 1984 holders of Washington Public Power Supply System (WPPSS) Project No. 4 and No. 5 revenue bonds sued the State of Washington and certain elected officials of the state in a class action in

King County (Washington) Superior Court seeking, under several alternative theories, to impose liability on the state as a consequence of default by WPPSS on those bonds. The position of the state in response to this action is that neither it nor any of its officers are liable on the bonds or as a consequence of the default. The Superior Court agreed and, on June 27, 1985, granted the state's motion to dismiss the action for failure to state a legally viable claim. The total amount sought by the plaintiffs by way of damages is in excess of $7.25 billion and an appeal is currently under consideration.

* * *

EXHIBIT 19

PROPOSED REVISIONS TO THE 1985-87 OPERATING BUDGET

(SEAL)

Submitted by
Governor Booth Gardner

March 1985

WASHINGTON STATE REVENUE
(Dollars in Thousands)

Source	1983-85 Biennium General Fund	1983-85 Biennium All Funds	1985-87 Biennium General Fund	1985-87 Biennium All Funds
State Taxes				
General and Selective Sales				
Retail Sales	3,721,051	3,809,706	4,417,756	4,547,965
Use	327,423	327,423	391,398	391,398
Motor Vehicle Fuels	0	734,316	0	849,924
Liquor Sales	143,708	160,612	152,342	170,304
Cigarette and Tobacco	197,079	197,079	207,419	207,419
Real Estate Excise	189,270	189,270	262,375	262,375
Gross Receipts				
Business and Occupation	1,269,401	1,269,401	1,598,202	1,598,202
Public Utility	238,873	238,873	275,285	275,285
Insurance Premiums	113,660	113,660	128,608	128,608
Property & In-Lieu Excises				
Property	978,573	978,573	1,139,317	1,139,317
Motor Vehicle Excise	375,681	423,489	425,597	473,916
Boat Excise	8,454	8,454	15,441	15,441
Public Utility District Excise	33,740	33,740	40,090	40,090
Timber Excise	32,980	75,645	37,380	78,170
Miscellaneous				
Inheritance and Gift	38,826	38,826	22,600	22,600
Other Taxes	102,525	116,892	114,179	130,856
Total Taxes	7,771,244	8,715,959	9,227,989	10,331,870
State Non-Tax Revenue				
Licenses, Permits, Fees	61,967	441,629	68,065	467,661
Liquor Profits and Misc Revenue	54,858	102,358	50,237	94,185
Earnings on Investments	56,700	167,137	51,900	159,811
Tuition	228,664	266,558	250,789	298,582
Timber Sales	2,556	173,415	2,870	147,390
Lottery	134,746	185,072	196,795	266,920
Proceeds of Bond Issues	0	786,525	0	1,068,439
Debt Service	—204,433	6,759	—264,213	12,463
Other Non-Tax Revenue	44,176	1,219,975	40,364	1,648,827
Total Non-Tax Revenue	379,234	3,349,428	396,807	4,164,278
Total State Revenue	8,150,478	12,065,387	9,624,796	14,496,148
Federal Revenue	1,881,032	3,051,874	2,090,184	3,443,131
Private/Local Revenue	25,130	112,130	28,529	129,213
TOTAL	10,056,640	15,229,391	11,743,509	18,068,492

Table 15

BUDGETED TREASURY FUNDS—CASH SURPLUS

By Fund Classification, Fund

	6/30/83 Actual Balance	6/30/85 Estimated Balance	1985-87 Proposed Revenue	1985-87 Proposed Expenditures	6/30/87 Estimated Balance
GENERAL FUND					
General Fund	32,189,000	29,001,346	11,743,510,120	11,444,741,239	327,770,227
ACCOUNTS WITHIN THE GENERAL FUND					
Aeronautics Account	448,805	213,280	1,367,047	1,381,955	198,372
Aquatic Lands Enhancement Account	—	544,546	1,555,690	2,099,700	536
Architects License Account	177,966	256,071	375,600	470,210	161,461
Archives & Records Management Account	6,661	45,310	1,715,873	1,756,911	4,272
Business Enterprises Revolving Account	—	190,110	692,002	666,439	215,673
C E P and R I Account	2,488,488	1,472,353	(66,150)	930,000	476,203
Capitol Building Construction Account	1,670,576	1,397,454	3,935,298	5,270,000	62,752
Capitol Purchase and Development Account	709,290	880,934	1,661,699	928,000	1,614,633
Cemetery Account	8,317	480	130,731	117,870	13,341
Centennial Commission Account	—	—	251,069	188,302	62,767
Central Washington University Capital Projects Account	2,753,341	3,232,522	4,126,861	3,957,000	3,402,383
Certified Public Accountant Exam Account	—	33,590	404,990	410,148	28,432

	6/30/83 Actual Balance	6/30/85 Estimated Balance	1985-87 Proposed Revenue	1985-87 Proposed Expenditures	6/30/87 Estimated Balance
Community College Capital Construction Account	1,559,386	253,875	—	253,000	875
Community Colleges Capital Projects	3,224,827	—	331,267	1,000	330,267
Convention and Trade Center Account	90,972,307	75,905,018	8,931,794	80,437,592	4,399,220
County Sales and Use Tax Account	(10,051)	915	7,894,000	7,894,000	915
Crime Victims Compensation Account	827,921	250,673	—	—	250,673
Criminal Justice Training Account	1,617,352	14,880	—	—	14,880
Death Investigations Account	—	458,327	1,065,562	933,694	590,195
DSHS Construction Account	6,717,828	14,768,131	78,616,000	93,174,000	210,131
Eastern Washington University Capital Projects Account	928,302	1,005,786	2,770,111	3,045,000	730,897
Feed and Fertilizer Account	12,197	12,208	17,600	17,306	12,502
Fire Training Construction Account	4,368,784	1,152,143	393,484	1,219,000	326,627
Fisheries Capital Projects Account	1,135,473	2,328,782	3,261,000	4,367,000	1,222,782
Flood Control Assistance Account	—	—	4,000,000	4,000,000	—
Forest Development Account	4,086,496	9,918,506	10,614,461	20,409,370	123,597
Geothermal Account	—	5,156	291,400	219,534	77,022
Handicapped Facilities Construction Account	1,933,236	4,242,406	—	4,242,000	406
Harbor Improvement Account	133,562	95,589	22,080	22,073	95,596
Hazardous Waste Control & Elimination Account	—	165,124	2,304,000	2,423,012	46,112
Health Professions Account	(7,758)	753,989	5,530,040	6,012,521	271,508
Higher Education Construction Account-1979	(2,494,123)	7,609,834	35,440,000	39,740,000	3,309,834
Higher Education Reimburseable Short Term Bond Account	—	—	22,954,000	22,954,000	—

Hospital Commission Account	155,151	141,323	1,346,604	1,336,588	151,339
Institutional Impact Account	(16,695)	48,435	350,000	375,000	23,435
Judiciary Education Account	1,065,237	—	—	—	—
Landowners Contingency Forest Fire Suppression	943,278	1,472,900	1,440,383	1,505,161	1,408,122
Litter Control Account	1,351,718	1,582,491	5,135,000	4,773,888	1,943,603
Local Improvement Revolving Account-Water Supply Facilities	353,355	10,432,004	81,016,968	87,997,487	3,451,485
Local Improvements Revolving Account-DSHS Facilities	1,633,605	1,783,395	253,286	1,290,000	746,681
Local Improvements Revolving Account-Waste Disposal	4,325,738	5,631,707	42,092,928	47,111,594	613,041
Local Jail Improvement and Construction Account	(511,827)	23,123,807	10,121,885	33,140,470	105,222
LIR Account-Public Recreation Facilities	977,644	444,790	143,660	376,000	212,450
LIR Account-Waste Disposal Facilities 1980	15,859,508	48,253,068	229,775,083	277,137,437	890,714
Marine Fuel Tax Refund	97,215	88,105	—	—	88,105
Medical Disciplinary Account	—	458,301	716,200	876,981	297,520
Millersylvania Park Current Account	7,288	7,288	—	—	7,288
Motor Transport Account	2,258,727	2,244,439	6,907,808	6,829,073	2,323,174
Municipal Sales and Use Tax Account	—	1,093	23,485,210	23,485,000	1,303
Opticians Account	98,629	101,759	—	—	101,759
Optometry Account	52,734	55,389	—	—	55,389
Outdoor Recreation Account	1,651,042	7,150,158	24,172,584	30,649,085	673,657
ORV (Off Road Vehicle) Account	1,805,236	2,583,885	3,672,246	4,915,811	1,340,320

	6/30/83 Actual Balance	6/30/85 Estimated Balance	1985-87 Proposed Revenue	1985-87 Proposed Expenditures	6/30/87 Estimated Balance
Pilotage Account	13,946	918	79,500	79,948	470
Professional Engineers Account	391,333	391,489	646,060	805,688	231,861
Public Facilities Construction Loan and Grant Revolving	4,316,454	4,291,000	55,308	—	4,346,308
Public Safety and Education Account	—	—	49,869,380	49,022,752	846,628
Real Estate Commission Account	3,942,719	2,758,672	3,438,310	5,290,057	906,925
Reclamation Revolving Account	1,195,006	713,559	425,155	1,124,439	14,275
Resource Management Cost Account	193,297	8,807,180	47,959,438	52,260,021	4,506,597
Revenue Accrual Account	71,628,417	28,417	—	—	28,417
Salmon Enhancement Construction Account	3,521,393	1,523,351	1,000,000	2,500,000	23,351
Sanitarian's Licensing Account	9,997	10,022	—	—	10,022
Search and Rescue Account	38,575	40,408	110,000	110,981	39,427
Snowmobile Account	315,472	157,054	579,564	655,462	81,156
Special Grass Seed Burning Research Account	36,671	—	69,182	69,182	—
State Board of Psychological Examiners Account	32,394	34,549	—	—	34,549
State Building Construction Account	(352,578)	6,639,639	61,152,000	67,699,000	92,639
State Capitol Historical Association Museum Account	74,786	75,479	107,000	122,556	59,923
State Capitol Vehicle Parking Account	206,537	46,938	102	—	47,040
ACCOUNTS WITHIN THE GENERAL FUND					
State Educational Grant Account	15,410	47,495	85,000	40,000	92,495
State Emergency Water Projects Revolving Account	11,555,313	7,024,023	513,181	7,350,655	186,549

State Facilities Renewal Account	—	—	58,303,000	58,303,000	—
State Higher Education Construction Account	256,806	4,922,122	94,276,000	96,958,000	2,240,122
State Investment Board Expense Account	10,018	10,062	1,555,261	1,556,173	9,150
State Timber Tax Account A	956,822	462,349	317,499	—	779,848
State Timber Tax Reserve Account	2,928,342	33,421	459,774	—	493,195
Survey and Maps Account	259,425	252,915	686,944	732,087	207,772
The Evergreen State College Capital Projects Account	109,070	40,160	220,015	132,000	128,175
Timber Tax Distribution Account	—	10,000	41,490,000	40,718,159	781,841
Timber Tax Distribution Guarantee Account	10,463,390	1,546,527	—	—	1,546,527
Traffic Safety Education Account	2,334,857	—	—	—	—
Trust Land Purchase Account	2,457,319	1,946,612	7,567,947	7,665,083	1,849,476
University of Washington Building Account	344,230	1,178,955	4,590,035	5,534,000	234,990
Washington Future-Community College Capital Improvement	175,332	56,564	25,626	—	82,190
Washington State University Building Account	3,570,987	5,730,530	14,779,425	17,223,000	3,286,955
Washington State University Construction Account	12,702	12,702	—	—	12,702
Water Quality Bond Account	—	—	100,000,000	100,000,000	—
Western Washington University Capital Projects Account	442,005	840,428	3,867,063	4,011,000	696,491
Winter Recreation Program Account	101,690	117,319	194,828	310,000	2,147
TOTAL Accounts within the General Fund	276,934,903	282,563,188	1,125,639,951	1,351,613,455	56,589,684

	6/30/83 Actual Balance	6/30/85 Estimated Balance	1985-87 Proposed Revenue	1985-87 Proposed Expenditures	6/30/87 Estimated Balance
SPECIAL REVENUE—MOTOR VEHICLE					
Motor Vehicle Fund	37,533,518	10,489,848	1,590,197,221	1,596,735,095	3,951,974
SPECIAL REVENUE—ALL OTHER					
Administrative Contingency Fund	1,328,892	1,310,734	5,892,521	5,844,502	1,358,753
Commercial Feed Fund	168,052	228,599	506,656	482,739	252,516
Common School Construction Fund	6,008,410	28,309,975	130,757,963	156,013,000	3,054,938
Electrical License Fund	1,241,345	2,754,537	9,014,866	7,323,588	4,445,815
Fertilizer, Agricultural, Mineral and Lime Fund	135,293	202,888	452,960	435,812	220,036
Forest Reserve Fund	—	—	25,164,000	25,164,000	—
Game Special Wildlife Account	4,444	3,393	304,056	296,561	10,888
Grade Crossing Protective Fund	1,580,450	1,348,346	287,915	200,000	1,436,261
Highway Safety Fund	8,832,104	2,028,200	50,993,652	51,114,115	1,907,737
Hood Canal Bridge Account	5,546,163	101,296	186,007	—	287,303
Liquor Excise Tax Fund	2,813,620	2,671,083	17,962,400	17,962,400	2,671,083
Motorcycle Safety Education Account	35,720	49,908	145,474	192,645	2,737
Nursery Inspection Fund	271,172	426,995	725,558	631,396	521,157
Public Service Revolving Fund	3,848,949	4,500,603	17,742,121	20,684,692	1,558,032
Puget Sound Capital Construction Account	8,687,509	4,191,892	47,178,726	42,928,101	8,442,517
Puget Sound Ferry Operations Account	—	214,983	48,024,086	47,371,084	867,985
Puget Sound Reserve Account	173,411	353,369	4,148,213	3,958,145	543,437
Recreational Vehicle Account	58,147	478,113	417,759	—	895,872

Rural Arterial Trust Account	—	4,891,039	17,744,755	21,042,261	1,593,533
Seed Fund	131,040	108,063	1,028,170	984,589	151,644
State Game Fund	8,580,893	5,071,475	66,878,372	68,858,136	3,091,711
State Patrol Highway Account	365,157	12,552,648	121,849,117	127,029,439	7,372,326
Stream Gaging Basic Data Fund	47,108	24,608	211,774	200,000	36,382
Unemployment Compensation Administration Fund	725,413	2,762,475	110,162,705	104,596,786	8,328,394
Urban Arterial Trust Account	9,921,037	12,150,326	69,827,305	68,485,543	13,492,088
Vessel Gear License and Permit Reduction Fund	(122,864)	216,077	—	—	216,077
Voluntary Action Center Account	—	654	—	—	654
TOTAL Special Revenue - All Other	60,381,465	86,952,279	747,607,131	771,799,534	62,759,876
BOND RETIREMENT AND INTEREST					
Common School Building Bond Redemption Fund-1967	1,942,962	127,849	6,971,488	6,876,110	223,227
Community College Capital Construction Bond Retirement	472,033	637,867	16,487,149	16,067,247	1,057,769
Community College Capital Improvement Bond Redemption Fund	367,867	485,124	7,426,240	7,508,345	403,019
Community College Refunding Bond Retirement Fund-1974	535,822	815,817	9,403,137	9,457,123	761,831
Emergency Water Projects Bond Redemption Fund-1977	20,367	26,832	2,612,282	2,594,770	44,344
Ferry Bond Retirement Fund 1979	4,319,992	6,722,046	29,640,319	29,142,170	7,221,095
Fisheries Bonds 1977 Bond Redemption Fund	14,346	15,811	3,466,799	3,476,774	5,836

	6/30/83 Actual Balance	6/30/85 Estimated Balance	1985-87 Proposed Revenue	1985-87 Proposed Expenditures	6/30/87 Estimated Balance
General Adminstration Bond Redemption Fund	23,627	360,316	665,934	29,425	996,825
General Obligation Bond Retirement 1979	895,509	42,016	208,999,872	208,589,280	452,608
Higher Education Bond Retirement Fund of 1977	35,400	66,549	15,063,799	15,087,751	42,597
Higher Education Bond Retirement-1979	93,926	98,481	32,487,498	32,531,592	54,387
Higher Education Refunding Bond Retirement Fund of 1977	73,882	95,777	8,808,897	8,746,565	158,109
Highway Bond Retirement Fund	16,966,098	25,371,050	150,777,946	138,861,113	37,287,883
Indian Cultural Center Construction Bond Redemption Fund	531	9,197	243,406	234,600	18,003
Juvenile Correctional Institutional Bldg Bond Redemption	334,893	—	—	—	—
Loan Principal and Interest Fund	—	—	—	—	—
Office-Laboratory Facilities Bond Redemption Fund	16,127	21,492	290,879	276,830	35,541
BOND RETIREMENT AND INTEREST					
Outdoor Recreation Bond Redemption Fund-1967	3,269,858	3,414,879	6,569,332	6,276,470	3,307,741
Public School Building Bond Redemption Fund-1961	341,428	341,428	—	—	341,428
Public School Building Bond Redemption Fund-1963	4,627,702	—	—	—	—

Public School Building Bond Redemption Fund-1965	107,893	145,901	2,458,323	2,470,955	133,269
Recreation Improvements Bond Redemption Fund	333,689	442,925	5,881,072	5,990,090	333,907
Salmon Enhancement Construction Bond Retirement Fund	33,206	45,016	4,661,918	4,666,130	40,804
Social and Health Services Bond Redemption Fund of 1976	316,936	419,969	9,556,904	9,480,564	496,309
Social and Health Services Facilities Bond Redemption Fund	176,821	233,300	3,687,473	3,734,611	186,162
Spokane River Toll Bridge Account	261,143	203,265	915,884	886,400	232,749
State Building and Higher Ed Bond Redemption Fund-1965	141,739	190,583	3,141,318	3,215,565	116,336
State Building and Higher Ed Bond Redemption Fund-1967	297,894	389,480	9,994,822	10,240,447	143,855
State Building and Parking Bond Redemption Fund-1969	2,670,236	2,849,751	2,278,415	2,456,880	2,671,286
State Building Authority Bond Redemption Fund	555,314	740,894	9,349,879	9,562,105	528,668
State Building Bond Redemption Fund-1975	37,571	71,987	1,406,327	1,358,440	119,874
State Building Bond Redemption Fund-1967	715,674	766,214	762,814	652,100	876,928
State Building Bond Redemption Fund-1973	150,380	198,613	3,755,136	3,824,535	129,214
State Building Bond Redemption Fund-1973A	12,611	16,294	385,957	375,371	26,880
State Building Construction Bond Redemption Fund	193,926	193,926	—	—	193,926

	6/30/83 Actual Balance	6/30/85 Estimated Balance	1985-87 Proposed Revenue	1985-87 Proposed Expenditures	6/30/87 Estimated Balance
State Facilities Renewal Bond Retirement	—	—	6,465,000	6,356,000	109,000
State Higher Education Bond Redemption Fund-1973	198,220	261,338	4,346,042	4,374,678	232,702
State Higher Education Bond Redemption Fund-1974	40,548	54,313	1,237,017	1,201,300	90,030
University of Washington Bond Retirement Fund	(24,092)	2,046,313	227,522	—	2,273,835
Washington State University Bond Retirement Fund	4,551	6,261	563,450	559,295	10,416
Washington State University Bond Retirement Fund	2,966,422	2,617,709	(904,388)	—	1,713,321
Waste Disposal Facilities Bond Redemption Fund	1,184,681	160,646	99,035,872	98,604,041	592,477
Water Pollution Control Facilities Bond Redemption Fund	108,451	144,356	3,946,940	4,015,067	76,229
Water Quality Bond Retirement	—	—	50,000	—	50,000
Water Supply Facilities Bond Redemption Fund	532,874	766,638	11,797,062	11,974,758	588,942
1975 State Higher Education Bond Retirement Fund	100,718	131,598	2,159,144	2,173,165	117,577
1975 University of Washington Hospital Bond Retirement	59,036	78,984	1,157,759	1,165,915	70,828
1976 Fisheries Bond Retirement Fund	37,731	49,500	798,589	766,136	81,953

1977 Fire Service Training Center Bond Retirement Fund	4,979	15,530	1,617,821	1,626,243	7,108
TOTAL Bond Retirement and Interest	45,571,522	51,894,735	690,649,049	677,486,956	65,056,828
WORKING CAPITAL					
Administrative Hearings Revolving Fund	74,882	136,954	8,280,362	8,404,131	13,185
Auditing Services Revolving Fund	171,625	251,681	7,887,948	7,832,163	307,466
Centennial Partnership Fund	—	—	—	—	—
Coastal Protective Revolving Fund	61,471	—	71,887	42,926	28,961
Data Processing Revolving Fund	8,077,426	7,799,460	86,847,202	87,724,909	6,921,753
Department of Personnel Service Fund	572,607	1,243,043	14,387,790	11,501,003	4,129,830
General Administration Facilities & Services Revolving Fund	(163,400)	77,125	20,258,369	19,432,557	902,937
General Administration Management	226,576	441,665	5,842,148	5,791,706	492,107
Higher Education Personnel Board Service Fund	23,604	18,472	2,110,537	1,780,456	348,553
Legal Services Revolving Fund	(8,589)	695,925	31,710,914	32,068,395	338,444
Municipal Revolving Fund	234,475	277,934	13,447,104	13,650,208	74,830
Salary and Health Increase-Dedicated Funds	(145,309)	—	47,707,448	47,707,448	—
Secretary of State Revolving Fund	79,829	22,266	412,458	417,170	17,554
State Employees' Insurance Fund	1,636,831	2,077,432	2,293,987	1,821,213	2,550,206
State Treasurer's Service Fund	4,995,533	4,392,472	7,610,029	7,702,802	4,299,699
TOTAL Working Capital	15,837,561	17,434,429	248,868,183	245,877,087	20,425,525
BUSINESS ENTERPRISE					
Liquor Board Revolving Fund	2,681,146	2,568,671	132,783,894	132,106,680	3,245,885

	6/30/83 Actual Balance	6/30/85 Estimated Balance	1985-87 Proposed Revenue	1985-87 Proposed Expenditures	6/30/87 Estimated Balance
TRUST AND AGENCY					
Accident Fund	—	—	75,787,079	75,787,079	—
Business Enterprises Revolving Fund	160,489	—	—	—	—
Deferred Compensation Revolving Fund	760,457	1,084,831	530,350	1,240,134	375,047
Gambling Revolving Fund	2,642,143	1,544,620	7,674,259	7,235,426	1,983,453
Medical Aid Fund	—	—	73,889,824	73,889,824	—
Plumbing Certificate Fund	314,280	301,991	331,973	435,965	197,999
Pressure Systems Safety Fund	307,930	202,784	1,293,767	1,069,477	427,074
Public Facilities Construction Loan Account	1,348,993	555,147	304,158	242,077	617,228
Radiation Perpetual Maintenance Fund	—	32,692	—	—	32,692
Retirement System Expense Fund	509,748	1,670,123	13,574,466	14,393,691	850,898
Teacher's Retirement Fund	—	—	—	—	—
Volunteer Firemen's Relief and Pension Fund	1,839,265	2,536,797	958,023	205,628	3,289,192
Wash. Library Network Computer System Revolving Fund	448,278	126,000	13,599,883	12,856,731	869,152
TOTAL Trust and Agency	8,331,583	8,054,985	187,943,782	187,356,032	8,642,735
TOTAL TREASURY FUNDS—CASH SURPLUS	479,460,698	488,959,481	16,467,199,331	16,407,716,078	548,422,734

* * *

EXHIBIT 24

Exhibit No. — entitled Summary Report With Respect to SB 3677 was prepared by the Department of Revenue in anticipation of possible revenue legislation which might have been submitted to the 49th session of the Washington State Legislature in 1985. The possibility of such legislation was proposed by Governor Booth Gardner in a public announcement. A draft of such legislation to which the exhibit report is directed was prepared by the Office of the Code Reviser. The legislation, however, was not formally introduced and thus was not considered by any legislative committee in hearing or in other action nor was it acted upon by either house of the Washington State Legislature.

SENATE BILL NO. 3677

SUMMARY:

This bill provides a guaranteed source of funding for the budget stabilization account and additional revenues for the 1985-87 biennium.

The budget stabilization account is funded by extending the retail sales tax to motor vehicle fuel. The tax is computed on the basis of the price at the pump, including state and federal taxes imposed at the distributor level. The tax is estimated to raise $375 million during the 1985-87 biennium. It will be effective June 1, 1985.

When the budget stabilization account reaches $300 million the state sales tax rate will automatically be reduced to 6 percent. Funds in the budget stabilization account may be appropriated by majority vote of the legislature.

The bill also increases the B&O tax rate on services from 1.5 percent to 2 percent, effective May 1, 1985. This increase will raise an additional $6.3 million in the 1983-85 biennium and $153.6 in the 85-87 biennium. The regular B&O rate on medical services will be reduced to 1.5 percent for medical practitioners subject to the additional 1 percent B&O tax imposed to fund Senator McDermott's health care cost containment program, Senate Bill 3320.

The revenues to be raised by this bill are as follows (in millions):

	83-85	85-87
Budget Stabilization Acct.		
Sales tax m.v. fuel	$-0-	$300
General Fund		
Service B&O tax	6.3	160.3
S.B. 3320 (eff. 7-1-86)	-0-	(6.7)
Sales tax reduction (eff. 1-1-87)		(79.0)
	$6.3	$74.6

Department of Revenue
April 8, 1985
Contact Matt Coyle, Deputy Director
753-4196

SENATE BILL 3677

Section by Section Analysis

Section 1. Eliminates the sales tax exemption for motor vehicle and special fuel. The sales tax will be computed on the basis of the price at the pump, including state and federal excise taxes imposed at the distributor level.

Section 2. Removes the corresponding use tax (RCW Ch. 82.12) exemption for motor vehicle and special fuel.

Section 3. Increases the B&O tax rate on real estate commissions from 1.5 percent to 2 percent. This B&O rate has historically been the same as the service rate. Effective May 1, 1985.

Section 4. Increases the B&O tax rate on services from 1.5 percent to 2 percent, effective May 1, 1985. Provides for a reduction in the B&O rate to 1.5 percent for medical practitioners subject to

the additional 1 percent B&O tax used to fund health care costs under SB 3320.

Section 5. Provides that sales tax receipts from motor vehicle and special fuels are to be deposited in the budget stabilization account.

Section 6. Provides that use tax receipts from motor vehicle and special fuels are to be deposited in the budget stabilization account.

Section 7. Provides for a reduction in the sales tax rate from 6.5 percent to 6 percent when the budget stabilization account reaches $300 million. (See Sec. 12)

Section 8. A technical correction. Deletes references to the OFM Director's duty to provide for transfers and repayments to the budget stabilization account. (See Subsection 1(e)) This authority is no longer needed.

Section 9. Amends RCW 43.88.525 to create a new budget stabilization account in the state treasury. Deletes references to the previous budget stabilization account and attendant duties which are no longer necessary.

Section 10. Amends RCW 43.88.535 to provide that funds in the budget stabilization account may be appropriated by majority vote rather than a sixty percent vote. Deletes authority to waive deposits in the account in the event of an expenditure from the account.

Section 11. Repeals RCW 43.88.530 and .540, dealing with the former budget stabilization account. Because revenues for the account are guaranteed from the sales tax on motor vehicle fuel, these provisions are no longer necessary.

Section 12. Provide a $300 million cap for the budget stabilization account. When the balance in the account reaches $300 million, the general sales

tax rate is reduced from 6.5 percent to 6 percent, and sales and use tax receipts from motor vehicle and special fuel become available to the general fund.

Section 13. Provides for effective dates.
Sales and use tax on motor vehicle fuel—June 1, 1985
½ percent B&O tax increase—May 1, 1985

SUPREME COURT OF THE UNITED STATES

No. 85-2006

National Can Corporation, et al.,

Appellants

v.

Washington State Department of Revenue

APPEAL from the Supreme Court of Washington,

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted. This case is consolidated with 85-1963, *Tyler Pipe Industries, Inc. v. Washington Department of Revenue* a total of one hour is allotted for oral argument.

October 6, 1986

Justice Powell and Justice Scalia took no part in the consideration or decision of this petition.

Supreme Court, U.S.
FILED
FEB 20 1987
JOSEPH F. SPANIOL, JR.

Nos. 85-1963 and 85-2006

In The

Supreme Court of the United States

October Term, 1986

TYLER PIPE INDUSTRIES, INC.,
Appellant,

v.

STATE OF WASHINGTON
DEPARTMENT OF REVENUE,
Appellee.

NATIONAL CAN CORPORATION, *et al.*,
Appellants,

v.

STATE OF WASHINGTON
DEPARTMENT OF REVENUE,
Appellee.

ON APPEAL FROM THE SUPREME COURT OF WASHINGTON

JOINT APPENDIX—VOL. II

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Appeal Docketed—Case No. 85-1963, May 30, 1986
Appeal Docketed—Case No. 85-2006, June 3, 1986
Probable Jurisdiction Noted October 6, 1986

STATE PRINTING PLANT OLYMPIA, WASHINGTON

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No. 85-2006

SUPREME COURT OF THE UNITED STATES

NATIONAL CAN CORPORATION, et al.,

Appellants,

v.

STATE OF WASHINGTON, DEPARTMENT OF REVENUE,

Appellee.

AFFIDAVIT OF RICHARD F. JONES

STATE OF WASHINGTON

County of Thurston

ss.

I, Richard F. Jones, being first duly sworn, upon oath state that:

1. I am the Reporter of Decisions for the Washington State Supreme Court, responsible for the official publication of decisions of that Court.

2. One of those decisions, *National Can Corporation, et al. v. The Department of Revenue*, 105 Wn.2d 327 (1986), is currently being prepared for hardbound publication. I was directed by the Court to change a portion of the opinion, 105 Wn.2d at 334, to correct its references to the West Virginia manufacturing and wholesaling tax rates. I have made that correction for the hardbound publication.

3. Attached hereto is a true and correct copy of the *National Can* decision as approved for final publication and as it will appear in the hardbound volume of Washington Reports.

/s/
Richard F. Jones

SUBSCRIBED AND SWORN TO before me this 13 day of February, 1987.

/s/
Sharon McCall
NOTARY PUBLIC in and for the State of Washington residing in Olympia.

[No. 51910-2. En Banc. March 6, 1986.]

NATIONAL CAN CORPORATION, ET AL, *Appellants*, v. THE DEPARTMENT OF REVENUE, *Respondent*.

[1] **Taxation — Interstate Business — Commerce Clause — Discrimination — Compensating Taxes — Validity.** A state tax on interstate business different from the tax imposed on purely local business meets the nondiscrimination mandate of the com-

merce clause if the two taxes are compensatory.

[2] **Taxation — Interstate Business — Commerce Clause — Discrimination — Compensating Taxes — Test.** Two taxes imposed respectively on local and interstate taxpayers are compensatory, for purposes of the nondiscrimination mandate of the commerce clause, if both taxes have the same legislative objective and local and interstate taxpayers receive equal treatment.

[3] **Taxation — Business and Occupation Tax — Interstate Business — Multiple Activities Exemption.** RCW 82.04.440, which provides that persons taxed under RCW 82.04.270 as local wholesalers shall not be taxed under RCW 82.04.240 as manufacturers, does not unconstitutionally discriminate against interstate commerce, and does not violate the apportionment or fairly-related requirements of the commerce clause.

[4] **Taxation — Interstate Business — Commerce Clause - Apportionment — Gross Proceeds.** A state tax on the privilege of doing business in the state is fairly apportioned as required by the commerce clause if the measure of the tax is the gross value of products manufactured in the state or the gross proceeds of sales in the state.

[5] **Taxation — Interstate Business — Commerce Clause — Fairly Related.** A state tax on the privilege of doing business in the state is fairly related to the services provided, as required by the commerce clause, if the taxpayer enjoys the privileges of the societal organization supported generally by taxes collected by the state.

Nature of Action: Various taxpayers sought refunds of business and occupation taxes paid, asserting invalidity of the tax under the commerce clause.

Superior Court: The Superior Court for Thurston County, No. 84-2-01900-7, Orris L. Hamilton, J. Pro Tem., entered a summary judgment on July 19, 1985, upholding the tax.

Supreme Court: Holding that the tax was not invalid under the commerce clause as construed by a recent United States Supreme Court opinion, the court *affirms* the judgment.

Bogle & Gates, John T. Piper, D. Michael Young, Franklin G. Dinces, and *James R. Johnston,* for appellants.

Kenneth O. Eikenberry, Attorney General, and *William B. Collins, Assistant,* for respondent.

UTTER, J.—This is a direct appeal from the trial court where various commercial enterprises (Taxpayers) claimed Washington's multiple activities exemption to the business and occupation (B & O) tax, RCW 82.04.440, discriminates against interstate commerce in violation of the commerce clause, U.S. Const. art. 1, § 8. The trial court ruled there was no unlawful discrimination. We agree and hold for the respondent, Department of Revenue, that the challenged exemption does not violate the commerce clause. Our holding makes it unnecessary to reach the other issues raised by the parties concerning the constitutionality of both the tax refund interest provision, RCW 82.32.060, and the proposed legislation, ESSB 3678, as well as the appropriate form of relief to be afforded Taxpayers.

Fifty–three separate actions for refunds of B & O taxes paid to the Department were filed. Each Taxpayer claimed the tax violates the commerce clause. These actions were joined for decision by the Thurston County Superior Court which granted the Department's motion for summary judgment and denied the Taxpayers' motions for injunctions against further collection of the B & O taxes in question. The 53 cases were consolidated for this appeal and, in addition, 52 other substantially similar actions are pending in Thurston County Superior Court. The amount in question is estimated to exceed $423 million.

Three plaintiffs were selected by the parties to serve as "test cases" in the appeal. Kalama Chemical, Inc., a representative plaintiff, manufactures its products in Washington and sells them outside of Washington. Xerox Corporation, the second representative plaintiff, manufactures its products outside Washington and sells them within Washington. The appellant in a companion case would appear to fit most closely within this category of plaintiffs. *See Tyler Pipe Indus., Inc. v. Department of Rev.,* 105 Wn.2d 318, 715 P.2d 123 (1986). National Can

Corporation, the third representative plaintiff, manufactures products in Washington for sale outside Washington, and also manufactures products outside Washington for sale in Washington. Kalama Chemical, Inc., seeks a refund of the manufacturing tax it paid ($495,000); Xerox Corporation seeks a refund of the wholesale tax it paid ($1.5 million); National Can Corporation seeks a refund of both the manufacturing and wholesale taxes it paid (approximately $900,000). The period in dispute is from 1980 to the present.

The issue before us is whether Washington's B & O tax exemption, RCW 82.04.440, violates the commerce clause because it (1) discriminates against interstate commerce, (2) is unfairly apportioned, or (3) is not fairly related to the services provided by the State.

Neither this court, nor the State Legislature, "is the final arbiter" of commerce clause issues. *See Southern Pac. Co. v. Arizona ex rel. Sullivan*, 325 U.S. 761, 89 L. Ed. 1915, 65 S. Ct. 1515 (1945). In an earlier challenge to this B & O tax, we recognized "our duty [is] to abide by controlling United States Supreme Court decisions construing the federal constitution." *Association of Wash. Stevedoring Cos. v. Department of Rev.*, 88 Wn.2d 315, 318, 559 P.2d 997 (1977), *rev'd*, 435 U.S. 734, 55 L. Ed. 2d 682, 98 S. Ct. 1388 (1978). This court's rulings on the constitutionality of the Washington B & O tax have generally withstood the United States Supreme Court's scrutiny, *see, e.g., General Motors Corp. v. Washington*, 377 U.S. 436, 12 L. Ed. 2d 430, 84 S. Ct. 1564 (1963); *Standard Pressed Steel Co. v. Department of Rev.*, 419 U.S. 560, 42 L. Ed. 2d 719, 95 S. Ct. 706 (1975), except when we have read the commerce clause too broadly and struck down the tax. *See Association of Wash. Stevedoring Cos. v. Department of Rev.*, 88 Wn.2d at 318–20.

We find ourselves today in a similar situation. For over 30 years, Washington's B & O tax has been repeatedly upheld by the federal courts against charges that it discriminated against interstate commerce. *See B.F. Goodrich Co. v. State*, 38 Wn.2d 663, 231 P.2d 325, *cert. denied*, 342

U.S. 876, 96 L. Ed. 659, 72 S. Ct. 167 (1951). In *B.F. Goodrich,* we held that the B & O tax does not discriminate against interstate commerce because, under that law, all wholesalers are taxed identically. We relied on the theory that any multiple–tax burdens on interstate commerce, whereby out–of–state businesses must pay a manufacturing tax in another state plus a wholesale tax in Washington, were merely "an inevitable consequence of the power of the several states to tax". 38 Wn.2d at 669; *see also General Motors Corp. v. State,* 60 Wn.2d 862, 376 P.2d 843 (1962) (B & O tax upheld against charges of discrimination, applying the *Goodrich* analysis). The Supreme Court affirmed, *General Motors Corp. v. Washington,* 377 U.S. 436, 12 L. Ed. 2d 430, 84 S. Ct. 1564 (1964), but specifically declined to pass on the question of discrimination in the form of multiple–tax burdens because the appellant there failed to demonstrate any actual multiple–tax burden by showing that another state levied an equivalent tax.

In *Chicago Bridge & Iron Co. v. Department of Rev.,* 98 Wn.2d 814, 832, 659 P.2d 463, *appeal dismissed,* 464 U.S. 1013 (1983), this court upheld the tax against charges of discrimination in the form of multiple–tax burdens. The court cited *Moorman Mfg. Co. v. Bair,* 437 U.S. 267, 277 n.12, 57 L. Ed. 2d 197, 98 S. Ct. 2340 (1978) for the proposition that the multiple–tax burdens experienced by interstate businesses are a "consequence of the *combined* effect of different states' laws" and were not caused by Washington's taxing scheme. 98 Wn.2d at 832. The United States Supreme Court dismissed the subsequent appeal "for want of a federal question," *Chicago Bridge & Iron Co. v. Washington Dep't of Rev.,* 464 U.S. 1013, 78 L. Ed. 2d 718, 104 S. Ct. 542 (1983), which we understand to be a decision on the merits. *Washington v. Confederated Bands & Tribes of Yakima Indian Nation,* 439 U.S. 463, 476 n.19, 58 L. Ed. 2d 740, 99 S. Ct. 740, *reh'g denied,* 440 U.S. 940, 59 L. Ed. 2d 500, 99 S. Ct. 1290 (1979).

Taxpayers assert, however, that a recent Supreme Court case, *Armco Inc. v. Hardesty,* 467 U.S. 638, 81 L. Ed. 2d

540, 104 S. Ct. 2620 (1984),[1] effectively overrules, *sub silentio*, these 30 years of Supreme Court doctrine. As a result of their reading of *Armco*, Taxpayers ask this court to strike down the state's B & O tax and refund all moneys allegedly improperly received under it since 1980.

Due to factual differences between the West Virginia tax, challenged in *Armco*, *see* 467 U.S. at 640, and the Washington tax, we do not believe the United States Supreme Court is requiring us to forge new commerce clause doctrine and disregard earlier decisions not overruled. We are unable to find such a command in the *Armco* decision. We are also troubled by the "free-rider" effect of Taxpayers' argument. As Taxpayers conceded at oral argument, their interpretation of *Armco* would force the State to forgo taxing a substantial number of in-state transactions where state services had admittedly been furnished. This implies that a state, to make up the deficit, must impose a double tax burden on in-state manufacturer-wholesalers.

THE COMMERCE CLAUSE ISSUES

RCW 82.04.220 imposes, in general, a tax upon the privilege of engaging in business activities in Washington. The tax is measured by the application of rates against (1) the value of the products, (2) gross proceeds of sales, or (3) the gross income of the business, whichever is applicable. RCW 82.04.240 imposes a tax upon Washington manufacturers. RCW 82.04.270 taxes every person who sells products at wholesale in Washington. The disputed provision, RCW 82.04.440, provides that persons taxable under RCW 82.04-

[1]The decision has already provoked considerable comment. *See* Judson & Duffy, *An Opportunity Missed: Armco, Inc. v. Hardesty, A Retreat From Economic Reality in Analysis of State Taxes*, 87 W. Va. L. Rev. 723 (1985); Lathrop, *Armco—A Narrow and Puzzling Test for Discriminatory State Taxes Under the Commerce Clause*, Taxes 551 (Aug. 1985); Lightburn & McArthur, *U.S. Supreme Court Ignores Unitary Issue in Armco, Inc. Opting for Discriminatory Finding*, 3 J. of St. Tax'n 211 (1984); Note, *A Call for Internal Consistency Among State Taxing Schemes: Armco, Inc. v. Hardesty*, 38 Tax Law. 519 (1985); *Sup. Ct. Holds West Virginia's Wholesale Gross Receipts Tax Unconstitutional*, Tax Adviser 487 (Aug. 1984); *West Virginia Gross Receipts Tax Discriminates Against Interstate Commerce*, 3 J. of St. Tax'n 143 (1984).

.270 (wholesalers) shall not be taxed under RCW 82.04.240 (as local manufacturers). Thus, local manufacturers who wholesale their products strictly in Washington pay only the wholesaling tax. Further, a local extractor of a product who wholesales in Washington pays only the wholesaling tax, just as do out-of-state extractors. RCW 82.04.440. Under RCW 82.04.240, in-state manufacturers and extractors who sell their products out of state pay only the manufacturing tax, at a rate substantially identical to that paid by in-state wholesalers.

A state B & O tax must pass a 4-prong test to be valid under the commerce clause: (1) There must be a sufficient *nexus* or connection between the taxing state and the activities taxed; (2) the tax must be *fairly apportioned*; (3) the tax cannot *discriminate* against interstate commerce in favor of local commerce; and (4) the tax must be *fairly related* to the services provided by the taxing state. *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 279, 51 L. Ed. 2d 326, 97 S. Ct. 1076 (1977); *Department of Rev. v. Association of Wash. Stevedoring Cos.*, 435 U.S. 734, 55 L. Ed. 2d 682, 98 S. Ct. 1388 (1978). Appellants contend that Washington's B & O tax fails the last three prongs of this test. Because the heart of Taxpayers' complaint is that the statute fails the third prong, discrimination, that issue is addressed first. The second (fairly apportioned) and fourth (fairly related) prongs will be addressed together. Nexus is not at issue in this case, but is contested in the companion case. *See Tyler Pipe Indus., Inc. v. Department of Rev.*, 105 Wn.2d 318, 715 P.2d 123 (1986).

A

DISCRIMINATION

[1] A state's taxing scheme is discriminatory under the commerce clause if it grants a direct commercial advantage to local businesses or subjects interstate commerce to a risk of multiple tax burdens, to which strictly local commerce is not exposed. *See Boston Stock Exch. v. State Tax Comm'n*, 429 U.S. 318, 50 L. Ed. 2d 514, 97 S. Ct. 599 (1977); *Gwin*,

White & Prince, Inc. v. Henneford, 305 U.S. 434, 83 L. Ed. 272, 59 S. Ct. 325 (1939). Any direct commercial advantage to local businesses inherent in Washington's B & O tax results from duplicative tax burdens; *e.g.*, the fact that strictly local businesses pay only one tax (either wholesale or manufacturing), while interstate businesses may possibly be subjected to one tax in this state and another tax at a different level of distribution in another state. Appellants contend that the recent Supreme Court decision, *Armco Inc. v. Hardesty*, 467 U.S. 638, 81 L. Ed. 2d 540, 104 S. Ct. 2620 (1984), controls where there is a possibility of multiple–tax burdens and requires the invalidation of Washington's B & O tax.

In *Armco*, the Court invalidated West Virginia's gross receipts tax, under which local manufacturers were exempted from payment of the wholesale tax when they sold their locally manufactured products in West Virginia. Out–of–state manufacturers were required to pay the West Virginia wholesale tax when they sold their products in that state.

West Virginia's gross receipts tax is claimed to be the mirror image of Washington's present tax. West Virginia granted strictly local manufacturer–wholesalers an exemption from its wholesale tax; Washington grants strictly local manufacturer–wholesalers an exemption from its manufacturing tax. Besides providing an exemption to taxpayers who have already paid one state excise tax, the two tax systems are similar in that they are gross receipts taxes.[2] Their points of difference, however, have become more noteworthy after the *Armco* decision. The West Virginia tax exacted substantially different tax rates on manufacturing (.88 percent) and wholesaling activities (.27 percent), which precluded the Court from finding that the wholesaling tax compensated for the manufacturing tax. *Armco*, 467 U.S. at 642. By exacting substantially identical rates (.44 percent) for each activity, the Washington tax does not present the same obstacle to finding the taxes are compensatory.

[2]The similarities were acknowledged by the Department when it was before the *Armco* Court. See *Armco*, 467 U.S. at 645. In oral argument before this court, however, the Department stated that the *Armco* opinion, with its emphasis on the rates and measures of the West Virginia tax, makes the differences between the two states' taxes more significant than their similarities.

In *Armco*, the Court held that West Virginia's tax facially discriminated against interstate commerce, 467 U.S. at 641, because it provided that "two companies selling . . . property at wholesale . . . will be treated differently depending on whether the taxpayer conducts manufacturing in the State or out of it." *Armco*, 467 U.S. at 642. The Court further determined that under the West Virginia tax scheme the manufacturing and wholesaling were not "substantially equivalent events" which would allow for the imposition of compensating taxes. *Armco*, 467 U.S. at 643. It also noted that West Virginia did not allow for a proportionate reduction of its manufacturing tax when the manufactured goods were sold out of state, but did allow such a reduction when the goods were partly manufactured out of state. This was taken as evidence that the manufacturing tax was "not in part a proxy for the gross receipts tax imposed on Armco . . ." 467 U.S. at 643.

[2] While the Court did not explain what it meant by "substantially equivalent events,"[3] its reliance on *Maryland v. Louisiana*, 451 U.S. 725, 758–60, 68 L. Ed. 2d 576, 101 S. Ct. 2114 (1981) indicates a criterion to guide us in determining when the selling and wholesaling taxes would be deemed compensatory and therefore substantially equivalent. In *Maryland v. Louisiana, supra*, Louisiana claimed its first–use tax compensated for a severance tax the State had imposed on local natural gas production. The first–use tax fell primarily on gas produced in the federal Outer Continental Shelf (OCS) and piped to Louisiana

[3]That the rate varies slightly for various types of businesses is not germane to the present issue. The variance comes from a subsequently enacted surtax. RCW 82.04.2904. Moreover, mathematical equality is not required. *General Am. Tank Car Corp. v. Day*, 270 U.S. 367, 373, 70 L. Ed. 635, 46 S. Ct. 234 (1926).

processing plants before being distributed to out–of–state consumers. The Court stated the 2–pronged criterion for determining compensatory taxes: (1) both taxes must be designed to meet the same ends; (2) local and interstate taxpayers similarly situated must receive equal treatment. 451 U.S. at 758–59.

The Louisiana tax failed on both prongs of the test. The purpose of the severance tax was to protect Louisiana's natural resources and compensate for their depletion. The first–use tax, however, could not be designed for that same purpose, "since Louisiana has no sovereign interest in being compensated for the severance of resources from the federally owned OCS land." 451 U.S. at 759. The Court also noted that Louisiana's first–use tax directly altered market forces in three impermissible ways: (1) certain local uses of OCS gas were exempted from the tax; (2) its credit system encouraged "natural gas owners involved in the production of OCS gas to invest in mineral exploration and development within Louisiana" rather than continue to pursue out–of–state, *e.g.*, OCS, development; (3) the credit system also assured that in–state end users of OCS gas would be insulated from the cost increases resulting from the first–use tax. 451 U.S. at 757.

None of the skewed market behavior due to the Louisiana tax appears to have developed in West Virginia. The *Armco* Court, however, found that the lack of symmetry in the West Virginia tax structure demonstrated that the selling and manufacturing taxes did not share the same end. 467 U.S. at 642–43. That West Virginia apportioned its manufacturing tax according to the percentage of in–state manufacturing a particular product represented, meant that West Virginia's selling tax could not be a substantially equivalent event for the manufacturing tax. In contrast, however, the flat rate character of the Washington taxes is evidence of the Legislature's intent to treat the two taxes as complementary and, therefore, compensatory.

[3] Furthermore, the Washington B & O tax does not exhibit the infirmities that led the Court in *Maryland v.*

Louisiana, supra, to conclude the first–use tax could not be a compensatory tax for the state's severance tax. The Washington B & O tax is designed to tax the privilege of engaging in business activity *within* the state. RCW 82.04-.220. Both the selling and the manufacturing taxes are exacted to address the same state burdens attendant on granting such a privilege. All who engage in selling activity within Washington pay the selling B & O tax, while those in–state manufacturers who sell out of state are taxed on their manufacturing activity. Each Taxpayer is taxed only once, at a substantially uniform rate,[4] unlike West Virginia, for the privilege of doing business in Washington.

Nor does the tax exhibit a discriminatory impact. Unlike the Louisiana tax, the market forces are not altered by the incidence of the tax. In–state manufacturers selling out of state do not gain a tax advantage by shifting sales of their product to the local market. Similarly, out–of–state manufacturers selling in state gain no tax advantage by moving their manufacturing operations in state. Also in contrast with the Louisiana tax is the fact that in–state consumers are not insulated from the price effects of the tax on the goods.

We are further persuaded that the Washington tax is valid because it is conceptually identical to the pre–1968 New York stock transfer tax the Court endorsed in *Boston Stock Exch. v. State Tax Comm'n,* 429 U.S. 318, 50 L. Ed. 2d 514, 97 S. Ct. 599 (1977) which was in turn reaffirmed in *Armco,* 467 U.S. at 642. *Boston Stock Exchange* involved New York's attempt to keep the New York Stock Exchange by amending the stock transfer tax so that nonresidents who completed transfers entirely in New York paid a lower

[4]By way of example, the Court did suggest that sale and use taxes fell on substantially equivalent events. Other than representing activities farther downstream in the distribution chain, we do not see an economically significant difference between "sale and use" and "manufacturing and sale." *Complete Auto Transit, Inc. v. Brady,* 430 U.S. 274, 51 L. Ed. 2d 326, 97 S. Ct. 1076 (1977) requires some relationship between a legal distinction and "economic realities." 430 U.S. at 279.

tax than would residents, and that transfers occurring entirely within New York could only be taxed to a maximum of $300, while there was no ceiling on other transfers. The tax was patently discriminatory and, unlike the B & O tax, was not part of a larger tax structure. The Court, however, spoke favorably of the unamended statute that taxed residents and nonresidents alike on one of several taxable stock transactions that could occur within the state. For both kinds of taxpayers, "the occasion of the tax was the occurrence of at least one taxable event in the State, the rate of tax was based solely on the price of the securities, and the total tax was determined by the number of shares sold." 429 U.S. at 322–23.

The *Armco* Court relied heavily upon the *Boston Stock Exchange* case as authority for striking down the West Virginia tax. *Boston Stock Exchange*'s favorable treatment of the pre–1968 amendments, *see* 429 U.S. at 330, and the apparent centrality of that holding to *Armco* requires harmonization of the two opinions. The incongruities between Taxpayers' reading of *Armco* and earlier, well established commerce clause cases, *see, e.g., Commonwealth Edison Co. v. Montana,* 453 U.S. 609, 69 L. Ed. 2d 884, 101 S. Ct. 2946 (1981); *Complete Auto; Boston Stock Exchange,* makes us reluctant to extend *Armco* as Taxpayers urge. There is a disturbing formalism in their argument that manufacturing and wholesaling are never "substantially equivalent events." To read *Armco* thusly would foreclose analyzing a taxpayer's burden in light of both the structure of the relevant tax system and its effect on a single economic unit. Appellants' argument would force us to regard the gross receipts tax system as consisting of two separate taxes, manufacturing and selling, and to retreat from the *Complete Auto* "practical effects" test which *Armco* does not overrule or claim to modify. *Complete Auto Transit, Inc. v. Brady,* 430 U.S. 274, 51 L. Ed. 2d 326, 97 S. Ct. 1076 (1977). To do so would be to ignore the "economic realities," 430 U.S. at 279, that a business unit frequently operates at several levels in the distribution chain and the costs

of those various operations come to bear on the single product which serves as the measure of taxation. *See also* Judson & Duffy, *An Opportunity Missed: Armco, Inc. v. Hardesty, A Retreat From Economic Reality in Analysis of State Taxes*, 87 W. Va. L. Rev. 723, 741 (1985); Lathrop, *Armco—A Narrow and Puzzling Test for Discriminatory State Taxes Under the Commerce Clause*, Taxes 551, 552, 559 (Aug. 1985).

Similarly, to avoid other incongruities posed by Taxpayers' arguments, we do not read *Armco* as requiring that the "internal consistency" requirement be applied to determine discrimination. The concept, "internal consistency," originated in the fair apportionment analysis of a multi-state net income tax case, *Container Corp. of Am. v. Franchise Tax Bd.*, 463 U.S. 159, 169, 77 L. Ed. 2d 545, 103 S. Ct. 2933 (1983), and its applicability to gross receipts tax cases has been questioned. *See* Lathrop, at 557. Nevertheless, the concept seems to have been used only to determine whether Armco Inc., had to show actual harm once it had demonstrated the tax provision was facially discriminatory. *See* Judson & Duffy, 87 W. Va. L. Rev. at 739. As we have previously discussed, however, Washington's tax is not facially discriminatory. We note further that the Court, were it to have grafted the concept onto the discrimination prong, would have obscured the *Complete Auto* test by treating the "multiple taxation" apportionment prong as a discrimination problem. Reflecting its greater complexity, the "fair apportionment" prong has been subject to more generous standards than has the discrimination prong. *See, e.g., Container Corp.*, 463 U.S. at 170; *Moorman Mfg. v. Bair*, 437 U.S. 267, 278, 57 L. Ed. 2d 197, 98 S. Ct. 2340 (1978).

Because the West Virginia and Washington taxes differ significantly, we must reject appellants' argument and rely on the long history of the United States Supreme Court's treatment of this state's gross receipts tax as having withstood commerce clause challenges, *see Department of Rev. v. Association of Wash. Stevedoring Cos.*, 435 U.S. 734, 55 L. Ed. 2d 682, 98 S. Ct. 1388 (1978); *Standard Pressed*

Steel Co. v. Department of Rev., 419 U.S. 560, 42 L. Ed. 2d 719, 95 S. Ct. 706 (1975); *General Motors Corp. v. Washington*, 377 U.S. 436, 12 L. Ed. 2d 430, 84 S. Ct. 1564 (1964); *Chicago Bridge & Iron Co. v. Department of Rev.*, 98 Wn.2d 814, 659 P.2d 463, *appeal dismissed*, 464 U.S. 1013 (1983); *Crown Zellerbach Corp. v. State*, 45 Wn.2d 749, 278 P.2d 305 (1954); *B.F. Goodrich Co. v. State*, 38 Wn.2d 663, 231 P.2d 325, *cert. denied*, 342 U.S. 876, 96 L. Ed. 659, 72 S. Ct. 167 (1951), as well as the general development of commerce clause analysis from *Complete Auto* to *Armco*. *See, e.g., Container Corp. of Am. v. Franchise Tax Bd., supra; Commonwealth Edison Co. v. Montana, supra; Maryland v. Louisiana, supra; Moorman Mfg. Co. v. Bair, supra*. Under these two lines of precedent, we do not find the tax discriminatory.

B

FAIR APPORTIONMENT; TAX FAIRLY RELATED TO SERVICES PROVIDED BY THE STATE

Taxpayers also claim that Washington's B & O tax violates the commerce clause because it is not fairly apportioned to reflect the amount of business conducted here, and it is not fairly related to the services rendered by Washington. As a result, Taxpayers complain that they are unfairly taxed upon more than 100 percent of their incomes. Hence, under the second and fourth prongs of the *Complete Auto* test, Taxpayers claim that interstate businesses are improperly subjected to multiple–tax burdens.

1. Fair Apportionment

Most apportionment cases have arisen in challenges to state income taxes where the income of a unitary multi–state business comes from a variety of tax jurisdictions. As Judson and Duffy note, a B & O tax on business activity within the state does not present the same difficulty in determining a nexus between business activity and the tax jurisdiction. Judson & Duffy, 87 W. Va. L. Rev. at 728. Moreover, even in the income tax cases, the Court has afforded legislatures a generous standard. In *Exxon Corp.*

v. Wisconsin Dep't of Rev., 447 U.S. 207, 219–20, 65 L. Ed. 2d 66, 100 S. Ct. 2109 (1980), the Court looked only to whether there was "'a rational relationship between the income attributed to the State and the intrastate values of the enterprise.'" *See also, e.g., Container Corp. of Am. v. Franchise Tax Bd., supra.* Earlier, the *Moorman* Court had refused to require Iowa to employ the favored 3–factor test, urged here by Taxpayers, instead of its single–factor test for apportioning interstate commerce income. To disturb the formula, the taxpayers in *Moorman* would have to show by "'clear and cogent evidence' that the income attributed to the State is in fact 'out of all appropriate proportions to the business transacted . . . in that State' . . . or has 'led to a grossly distorted result' . . ." 437 U.S. at 274. The mere threat that income not generated in the state will be taxed under a formula does not make the formula constitutionally defective. 437 U.S. at 278. Congress, not the Court, must enact national uniform rules for the division of income if it finds duplicative taxation a problem. 437 U.S. at 279.

Washington's B & O tax has been held to be fairly apportioned in previous cases. *See Department of Rev. v. Association of Wash. Stevedoring Cos., supra; Standard Pressed Steel Co. v. Department of Rev., supra; Chicago Bridge & Iron Co. v. Department of Rev., supra.* Nonetheless, Taxpayers urge that, under *Armco,* the tax must now pass the "internal consistency" test articulated in *Container Corp. of Am. v. Franchise Tax Bd., supra,* and cited in *Armco.* In applying that test, the court must hypothesize that every jurisdiction has adopted a tax identical to the tax in question; the result must be that no more than 100 percent of a single business's income is taxed by one state.

We agree with the Department that the "internal consistency" test articulated in *Container Corp.* and *Armco* does not apply to the determination whether the B & O tax is fairly apportioned. This is because Washington does not tax the income of a unitary business, but rather taxes only the privilege of manufacturing or selling within the state.

Thus, respondent urges that Washington's tax is apportioned by "allocation"; that is, the tax is applied only to the value of products manufactured in Washington or to the gross proceeds of sales in Washington.

[4] We do not read the *Armco* opinion to apply its "internal consistency" test to the question of whether a state gross receipts tax is fairly apportioned. We believe that it does not apply not only because of the appeal of the Department's argument, but because the *Armco* Court said nothing about the status of *Department of Rev. v. Association of Wash. Stevedoring Cos.*, 435 U.S. 734, 55 L. Ed. 2d 682, 98 S. Ct. 1388 (1978). If the "internal consistency" requirement applied to the fair apportionment prong, *Washington Stevedoring* should be overruled for requiring a showing of actual harm to make out unfair apportionment. 435 U.S. at 746 & n.16. Further, speaking specifically of the tax challenged here, the Court said, "[w]hen a general business tax levies only on the value of services performed within the State, the tax is properly apportioned and multiple burdens logically cannot occur." 435 U.S. at 746–47.

2. Fairly Related

[5] The *Armco* Court did not address the "fairly related to state services" prong. The controlling case is *Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 69 L. Ed. 2d 884, 101 S. Ct. 2946 (1981). Certain Montana coal producers and their out–of–state customers argued that they should be permitted to show that the state's high coal severance tax was not fairly related to state services provided. The Court refused to view the fair relation test as a cost–benefit analysis of the taxes paid and services received. The test is basically a nexus test, with "the additional limitation that the *measure* of the tax must be reasonably related to the extent of the [taxpayer's] contact" with the state. 453 U.S. at 626. The Court declined to determine what a reasonable measure might be because (1) no usable legal test could adequately reflect the varied considerations that

"inform a decision about an acceptable rate or level of state taxation", 453 U.S. at 628; and, hence, (2) this is a question more suited to the political process. The taxpayer's "substantial privilege of mining coal" provided sufficient nexus and the only benefit the state needed to show was that the taxpayer enjoyed the "privileges of living in an organized society, established and safeguarded by the devotion of taxes to public purposes." 453 U.S. at 629. *See also Japan Line, Ltd. v. County of Los Angeles,* 441 U.S. 434, 60 L. Ed. 2d 336, 99 S. Ct. 1813 (1979).

Manufacturing, or wholesaling, would also appear to be privileges comparable to mining so that the nexus requirement is sufficiently met in the present case. Despite any warts Washington may suffer, the State can show that ours is "an organized society." While local manufacturer–sellers enjoy "two activities for the price of one", interstate businesses cannot, under this prong, apply a cost–benefit analysis to show how they have been short changed.

We believe the Washington B & O tax continues to meet commerce clause standards. We do not believe *Armco* requires the result urged by appellants and can be reconciled with compelling precedent not overruled in *Armco* and with scholarly commentary. We also believe the controlling facts in *Armco* differ significantly from those before us. The trial court is affirmed.

DOLLIVER, C.J., and BRACHTENBACH, DORE, PEARSON, ANDERSEN, CALLOW, GOODLOE, and DURHAM, JJ., concur.

Supreme Court, U.S.
FILED
NOV 20 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-2006

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1986

NATIONAL CAN CORPORATION, *et al.*,
Appellants,

v.

STATE OF WASHINGTON,
DEPARTMENT OF REVENUE,
Appellee.

ON APPEAL FROM THE SUPREME COURT
OF WASHINGTON

BRIEF FOR APPELLANTS

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November 19, 1986

QUESTIONS PRESENTED

1. May a state, consistent with the Commerce Clause, impose an unapportioned gross receipts tax on the manufacture of goods *for sale outside the state,* while exempting from the tax the identical manufacture of goods *for sale within the state?*

2. If a state imposes a tax on selling but grants *in-state* manufacturers who pay the selling tax an exemption from another tax, may the state—consistent with the Commerce Clause—impose its selling tax on the unapportioned gross receipts of *out-of-state* manufacturers, without granting them a comparable exemption or benefit?

LIST OF PARTIES

Appellants in Docket No. 85-2006 are 71 business enterprises listed at App. F to J.S. Appellants' Rule 28.1 designation appears at the appendix to this brief.

Consolidated with National Can's appeal is *Tyler Pipe Industries, Inc. v. Washington State Department of Revenue,* No. 85-1963, an appeal in which Tyler Pipe is the only appellant.

The State of Washington, through its administrative agency the Department of Revenue, is the sole appellee in both appeals.

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STATE OF WASHINGTON,
DEPARTMENT OF REVENUE,
Appellee.

ON APPEAL FROM THE SUPREME COURT
OF WASHINGTON

BRIEF FOR APPELLANTS

OPINIONS BELOW

The opinion of the Washington Supreme Court appears at App. A to J.S., and is reported at 105 Wash. 2d 327, 715 P.2d 128 (1986). The unpublished opinion of the Superior Court for Thurston County appears at App. B to J.S. and the judgment of that court is at App. C to J.S.

JURISDICTION

Appellants appeal from the final decision of the Washington Supreme Court rendered March 6, 1986. Notice of Appeal was timely filed in that court and the Superior Court for Thurston County on May 22, 1986. App. D to J.S. National Can docketed its appeal on June 3, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(2).

This Court noted probable jurisdiction on October 6, 1986. 107 S. Ct. 57-58 (1986), J.A. 281. That order consolidated this appeal with that of *Tyler Pipe Industries, Inc. v. Washington State Department of Revenue,* No. 85-1963.

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Commerce Clause of the United States Constitution (Art. I, §8, cl.3) and Revised Code of Washington, Title 82, are reproduced in pertinent part at App. E to J.S.

STATEMENT OF THE CASE

FACTS

This appeal arises from 53 actions brought for refund of taxes paid to the State of Washington by 71 manufacturers engaged in interstate commerce.

These manufacturers allege that the Washington taxes at issue violate the Commerce Clause of the United States Constitution. By agreement of the parties, three of the manufacturers were selected to serve as "test cases," representative of the rest. They present three situations:

(i) Manufacturing within Washington and selling outside the state. Kalama Chemical, Inc., and National Can Corporation are representative of companies that manufacture products in Washington for sale outside the state. Washington taxes the privilege of manufacturing within the state. Wash. Rev. Code § 82.04.240. Manufacturers like Kalama and National Can, who sell their products outside the state, must pay the tax. Exempt from the tax, however, are purely local companies, engaging in the identical manufacturing activity in Washington, but selling their products within the state. *See* Wash. Rev. Code § 82.04.440.

(ii) Manufacturing in other states and selling in Washington. Xerox Corporation and National Can Corporation are representative of companies that manufacture products outside Washington for sale within the state.

Washington taxes the privileges of selling at wholesale and at retail. Wash. Rev. Code §§ 82.04.270 & 82.04.250. Wholly local businesses, by paying either of these selling taxes, are awarded an exemption from the State's manufacturing tax. Interstate businesses who manufacture outside Washington—although they are required to pay the same Washington selling taxes—receive no such exemption or comparable benefit. *See* Wash. Rev. Code § 82.04.440.

(iii) Companies engaged in both the foregoing patterns of interstate activites, i.e. manufacturing in Washington for sale outside the state, as well as manufacturing in other states for sale in Washington. National Can Corporation is representative of those companies that combine both the Kalama and Xerox fact patterns.

Washington bases both its manufacturing and selling taxes on 100% of the gross receipts—without apportionment—from interstate activities having some nexus with the State. *See* Wash. Rev. Code §§ 82.04.220, 82.04.240, 82.04.250 and 82.04.270. This is true though the gross receipts are produced by a multistate combination of activities—i.e., by substantial activities in other states as well as activities in Washington. J.A. 174-76, 178-81, 184-85 and 189-91. The stipulated facts show that the taxpayers pay taxes to other states, apportioned to their activities in those states, based on the same income that is part of Washington's unapportioned tax base. J.A. 176-77, 181-82, and 191-92.

PROCEEDINGS BELOW

These 53 cases, presenting similar facts and the same legal issues, were joined for decision by the Superior Court of Thurston County. There being no factual disputes, the facts were stipulated (J.A. 174-92) and the cases proceeded to decision on cross motions for summary judgment. The Superior Court granted the State's motions for summary judgment and dismissed the taxpayers' actions. The 53 cases were consolidated for appeal to the Washington Supreme Court, which affirmed the Superior Court's dismissal of the

taxpayers' complaints, rejecting their contentions that the Washington tax scheme violates the Commerce Clause.

In noting probable jurisdiction, this Court consolidated this appeal with *Tyler Pipe Industries, Inc. v. Washington State Department of Revenue,* No. 85-1963. Tyler Pipe challenges Washington's wholesaling tax as failing to satisfy the Commerce and Due Process Clauses' nexus and "fair relation" requirements, as well as raising claims of discrimination and lack of fair apportionment under its particular facts. *See* Brief for Appellant, *Tyler Pipe Industries, Inc. v. Washington State Department of Revenue,* No. 85-1963.

SUMMARY OF ARGUMENT

The decision below is irreconcilable with the recent decision in *Armco, Inc. v. Hardesty,* 467 U.S. 638 (1984). Like the West Virginia scheme struck down in *Armco*, Washington imposes a gross receipts tax on manufacturing and gross receipts taxes on selling. West Virginia exempted wholly local business from its wholesaling tax that interstate commerce was required to pay. Washington exempts wholly local business from its manufacturing tax that interstate commerce must pay. The result is the same: interstate commerce is subjected to a tax burden not imposed on local commerce.

The discrimination persists regardless of the direction that interstate commerce flows. A Washington manufacturer selling its production outside the state is subject to the manufacturing tax while one selling its goods within the state is not. An out-of-state manufacturer selling in Washington pays the same Washington selling tax as local business does, but does not receive the exemption from the manufacturing tax that is awarded to local business. This Court has consistently held that a state may not give local business such a direct commercial advantage over interstate commerce.

Like the *Armco* dissent, the court below concluded that the manufacturing tax and selling taxes are "compensatory." Even if that conclusion were correct, it would merely lead to viewing Washington's manufacturing and selling taxes

together—as the *Armco* Court did in testing for discrimination. Applying the *Armco* analysis: if another state having nexus with an interstate business like National Can imposed taxes identical to Washington's, the tax burden on National Can would be at least twice the burden imposed on a purely local business.

That risk of multiple burdens is confirmed as a reality by the stipulated facts. Washington subjects these Appellants to an *unapportioned* tax based on 100% of the same receipts that are properly taxed on an *apportioned* basis by other states.

The lower court's conclusion that Washington's taxes can be saved by treating them as "compensatory" is futile because, even when the taxes are viewed together, they discriminate against interstate commerce. Moreover, that compensatory conclusion is wrong. Washington's taxes are imposed on manufacturing and selling—events that this Court held are "not 'substantially equivalent' " and do not support a "compensatory tax" conclusion. *Armco,* 467 U.S. at 643.

ARGUMENT

I. THE CHALLENGED TAXES ARE INDISTINGUISHABLE FROM TAXES THIS COURT HAS RECENTLY STRUCK DOWN AS DISCRIMINATORY.

In recent years it has frequently been necessary for this Court to strike down state taxes that have discriminated against interstate commerce.[1] A common element in such cases is the attempt to subject interstate commerce to tax burdens *not* imposed on local business or otherwise to favor local business with tax benefits denied to interstate commerce.

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[1] *See, e.g., Boston Stock Exchange v. State Tax Commission,* 429 U.S. 318 (1977); *Maryland v. Louisiana,* 451 U.S. 725 (1981); *Westinghouse Electric Corp. v. Tully,* 466 U.S. 388 (1984); *Bacchus Imports, Ltd. v. Dias,* 468 U.S. 263 (1984); *Armco, Inc. v. Hardesty,* 467 U.S. 638 (1984); *Arizona Public Service Co. v. Snead,* 441 U.S. 141 (1979).

This appeal presents questions answered by *Armco, Inc. v. Hardesty,* 467 U.S. 638 (1984). There a tax imposed on interstate commerce was invalidated because local business was exempt from the tax. Armco was an Ohio manufacturer selling its products into West Virginia. West Virginia imposed an unapportioned gross receipts tax on Armco's selling activity that local manufacturers engaged in the same selling activity did not pay. This Court found the discrimination of the tax to be revealed on its face. Noting that "a State may not tax a transaction or incident more heavily when it crosses state lines than when it occurs entirely within the State," the Court found that the West Virginia tax "appears to have just this effect." *Id.* at 642. The specific vice of the West Virginia tax was that "[t]he tax provides that two companies selling tangible property at wholesale in West Virginia will be treated differently depending on whether the taxpayer conducts manufacturing in the State or out of it." *Id.* National Can finds itself in just such a situation.

Like Armco, National Can is taxed for engaging in the exact activity performed by wholly local businesses who are not taxed. National Can manufactures products in Washington and sells a portion of them outside the state.[2] Washington imposes a gross receipts tax on manufacturing, but allows an exemption from the tax on the condition that the manufacturer sells the products locally. Wash. Rev. Code §§ 82.04.240 & 82.04.440. National Can's manufacturing activity is taxed because it sells out of state instead of locally.

West Virginia's exemption from its *selling* tax depended on whether the taxpayer *manufactured* in the state or out of it. Similarly, Washington's exemption from its *manufacturing* tax depends on whether the taxpayer *sells* in the state or out of it. This mirror-image similarity results from the fact that Washington once had West Virginia's scheme, but subsequently reversed the tax and the exemption. A 1948 decision of the Washington Supreme Court struck down the prior

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[2] This statement also describes the Kalama Chemical fact pattern.

scheme, anticipating this Court's *Armco* decision.[3] The Washington legislature responded by reversing the scheme so that wholly local business is now exempt from the manufacturing tax instead of the selling tax.[4] The defect remains the same. Local business is exempted from a tax that interstate commerce is required to pay.

On review in 1951, the Washington court readily saw the legislature's reversal as semantic rather than a change of economic substance; but it believed, based on then extant authorities, that Commerce Clause issues were controlled by such "verbal niceties."[5] The State itself has admitted to this Court that its present tax remains "very similar" to that struck down in *Armco*. Brief of the State of Washington Department of Revenue as Amicus Curiae at 1, *Armco, Inc. v. Hardesty,* 467 U.S. 638 (1984). This appeal tests whether purely semantic formalisms from an earlier day can defeat the substance of the *Armco* decision in an era when this Court has repudiated the exaltation of formalities over economic substance. *See Complete Auto Transit, Inc. v. Brady,* 430 U.S. 274, 288-89 (1977), *overruling Spector Motor Service, Inc. v. O'Connor,* 340 U.S. 602 (1951), and rejecting earlier Commerce Clause analysis that depended on the draftman's art rather than the economic effect of a tax.

Washington's scheme—viewed in the context of National Can's sale into Washington of products that it manufactures in other states[6]—closely resembles another tax held to be facially discriminatory. *See Maryland v. Louisiana,* 451 U.S. 725 (1981). Louisiana imposed a "First-Use Tax" on natural gas brought in from the outer continental shelf ("OCS").

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[3] *Columbia Steel Co. v. State,* 30 Wash. 2d 658, 192 P.2d 976 (1948), *cited with approval, Armco, Inc. v. Hardesty,* 467 U.S. 638, 642 & 645 n.8 (1984).

[4] *See* 1950 Wash. Laws Spec. Sess., ch.5, § 2 (codified at Wash. Rev. Code § 82.04.440).

[5] *B.F. Goodrich v. State,* 38 Wash. 2d 663, 668, 231 P.2d 325, 328, *cert. denied,* 342 U.S. 876 (1951).

[6] The Xerox pattern also involves companies that manufacture products in other states for sale in Washington.

Local gas producers received certain tax benefits, notably one described by the Court as follows:

> [A]n owner paying the First-Use Tax on OCS gas receives an equivalent tax credit on any state severance tax owed in connection with production in Louisiana.

Id. at 756. This Court found that the Louisiana credit favored local producers "[o]n its face." *Id.* That was because

> [t]he obvious economic effect of this Severance Tax Credit is to encourage natural gas owners involved in the production of OCS gas to invest in mineral exploration and development within Louisiana rather than to invest in further OCS development or in production in other states.

451 U.S. at 756-57. The economic effect observed by the Court was "obvious" because the tax benefit offered by Louisiana could be used only within that state.

Washington's taxes have this same economic effect. National Can and other out-of-state manufacturers (including Xerox) pay the selling tax that wholly local business pays, but local business is awarded an exemption from the manufacturing tax. Out-of-state manufacturers receive no comparable benefit. As in *Maryland v. Louisiana,* the exemption thus operates as an inducement for interstate commerce to shift its production into Washington rather than invest in other states.[7]

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[7] *See Westinghouse Electric Corp. v. Tully,* 466 U.S. 388 (1984) (striking down as discriminatory a tax credit that depended on whether the taxpayer exported from in state or out of state locations). *See also Arizona Public Service Co. v. Snead,* 441 U.S. 141 (1979), where this Court invalidated a state tax under a federal statute prohibiting discrimination against interstate commerce. The tax was imposed on companies generating electricity who were awarded a credit against a tax on the sale of the electricity—a credit having no value unless the electricity was sold within the state.

The court below has turned a blind eye to these infirmities in Washington's tax, opining that "out-of-state manufacturers selling in state gain no tax advantage by moving their manufacturing operations in state." App. to J.S. at A-10. The court ignored the advantage that out-of-state manufacturers selling within the state would gain by moving their manufacturing operations into Washington—i.e., manufacturing free of any tax. This advantage is illegal because "[t]he obvious economic effect . . . is to encourage . . . owners involved in [production] to invest in [the taxing state] rather than to invest . . . in production in other states." *Maryland v. Louisiana,* 451 U.S. at 756-57.

Referring to in-state manufacturers like National Can and Kalama, the court below opined that "[i]n-state manufacturers selling out of state do not gain a tax advantage by shifting sales of their product to the local market." App. to J.S. at A-10. Again, the court ignored the obvious tax advantage that would be gained by shifting from out-of-state selling to local selling—i.e., exemption from the tax otherwise payable on manufacturing. Wash. Rev. Code § 82.04.440. Shifting to local selling would, of course, incur a Washington tax on selling (Wash. Rev. Code §§ 82.04.250 or 82.04.270), but this would be offset by avoiding exposure to the taxes of other states based on selling activities. The exemption from Washington's tax on manufacturing remains a net advantage to local sellers.[8]

The Washington court's failure to see the advantage to local business stems from its reliance on the State's claim that "[a] business that manufactures and/or sells in Washington pays the same amount of Washington tax." *See* Appellee's Motion to Dismiss or Affirm at 16. If the challenged taxes were imposed on goods, it might be significant that National

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[8] In *Westinghouse Electric Corp. v. Tully,* 466 U.S. 388 (1984), the Court rejected a contention that a credit giving a direct commercial advantage to in-state business would be acceptable even if the credit-induced increase of in-state business results in a higher tax after allowing for the credit. *Id.* at 401 n.9, Table B.

Can would pay the same tax on a given amount of goods if it "manufactures and/or sells" them in Washington. The error in the "same amount of tax" claim is apparent, however, from the disparity in tax on a given amount of *business activity*—which is, after all, the privilege being taxed.[9] The disparity is blatant: a Washington manufacturer selling $1,000 of goods *locally* pays zero tax on its manufacturing activity. A Washington manufacturer like National Can, selling an identical $1,000 of goods out of state, pays a Washington manufacturing tax of $4.40.

The disparity persists when National Can sells in Washington $1,000 of goods that it manufactured out of state, because it pays a selling tax of $4.40. The tax cost to National Can for $2,000 worth of activities is thus a tax of $8.80—$4.40 on $1,000 of manufacturing activity plus $4.40 tax on $1,000 of selling activity. A similarly situated local business that manufactures and sells $1,000 of goods in Washington also engages in $1,000 of manufacturing activity and $1,000 of selling activity ($2,000 of activities), but pays a tax of only $4.40. Thus, National Can pays Washington twice the tax that a wholly local business pays for the *same quantum of activities.* For another example of this disparity, see *Fibreboard Paper Products Corporation v. State.*[10]

The court below described the advantage that Washington gives to local commerce as "two activities for the price of one." App. to J.S. at A-15. Such an advantage is not to be confused with the "fair encouragement" that the *Armco*

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[9]*See, e.g.,* RCW 82.04.220. The Washington court has expressly held that it "is the activity of manufacturing, not the product, which gets taxed." *Fibreboard Paper Products Corp. v. State,* 66 Wash. 2d 87, 90, 401 P.2d 623, 625 (1965), discussed *infra* at note 10.

[10]66 Wash. 2d 87, 401 P.2d 623 (1965). Fibreboard began its manufacturing process in Washington and completed it in Oregon before returning the goods to Washington for sale. A wholly local manufacturer would have paid to Washington only the selling tax and been exempt from the manufacturing tax. By contrast, Fibreboard was required to pay two Washington taxes—a tax on its manutacturing and a tax on its selling, because part of its manufacturing occurred out of state.

Court described in direct response to Washington's *amicus* brief. If Washington wished to offer "fair encouragement" for in-state manufacture, it could do so by imposing a tax only on selling.[11] In that situation, as the Court observed in *Armco,* an out-of-state manufacturer might still bear the burden of two taxes if the state of manufacture taxed manufacturing. The two taxes would result from the coincidence of different taxing systems in the two states. But such "fair encouragement" comes at a price. When the flow of the interstate traffic is in the opposite direction (i.e., manufacturing in Washington and selling out of state), Washington would not receive any tax. Washington is unwilling to accept this consequence of "fair encouragement." It insists on taxing "both ends" of the manufacturing-selling enterprise when interstate commerce is involved, but only the selling end if the business is wholly local.

II. WASHINGTON'S TAXES—DISCRIMINATORY ON THEIR FACE—CANNOT BE SAVED BY A "COMPENSATING TAX" THEORY.

The court below held that Washington's manufacturing tax and its selling taxes are valid because they are "compensatory."[12] App. to J.S. at A-11. Like the similar

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[11]Iowa achieved this kind of encouragement by adopting the sales factor as the single factor in its apportionment formula. *Moorman Mfg. Co. v. Bair,* 437 U.S. 267 (1978). A sharply divided court approved the encouragement despite the possibility of multiple taxation resulting from application of a 3-factor formula in the state of production. This Court did not permit such latitude, however, where a governing statute required that the measure of the tax be "the net income of the corporation . . . as is fairly attributable to any trade or business carried on or engaged in within the [taxing jurisdiction]." *General Motors Corp. v. District of Columbia,* 380 U.S. 553 (1965).

[12]The court below adopted the arguments made by both Washington and West Virginia in *Armco*—and rejected by this Court. *See* Brief of State of Washington Department of Revenue as Amicus Curiae at 6-7 and 16-18, and Appellee's Brief on the Merits at 79-84, *Armco, Inc. v. Hardesty,* 467 U.S. 638 (1984).

holding by the West Virginia Supreme Court—reversed by this Court in *Armco*—this conclusion is both futile and wrong.

A. When Washington's Tax Scheme Is Viewed As a Whole, Discrimination Persists.

Even if Washington's taxes are viewed as "compensatory," they discriminate against interstate commerce. That is because a compensatory conclusion simply requires that the taxes be considered together in testing for discrimination. Indeed, the court below premised its compensatory analysis on an insistence that Washington's taxes on manufacturing and selling are imposed upon a "single economic unit."[13]

Viewing the two taxes together will avail the State nothing. As the *Armco* Court said in responding to the compensatory argument: "Moreover, when the two taxes are considered together, discrimination against interstate commerce persists." 467 U.S. at 644. The Court explained:

> If Ohio or any of the other 48 States imposes a like tax

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[13] Any other view was declared to be a "disturbing formalism" that "would force us to regard the gross receipts tax system as consisting of two separate taxes, manufacturing and selling, and to retreat from the *Complete Auto* 'practical effects' test." App. to J.S. at A-13. The court acknowledged the "economic realities . . . that a business unit frequently operates at several levels in the distribution chain and the cost of those various operations come to bear on the single product which serves as the measure of taxation." App. to J.S. at A-11.

But the court was unable to adhere consistently to its own premise for the compensatory conclusion. After initially insisting that the taxes should be regarded as imposed upon a "single economic unit," the court reversed itself. In answering a contention that the Washington taxes lack fair apportionment, the court reasoned that "the 'internal consistency' test articulated in *Container Corp.* and *Armco* does not apply to the determination whether the B & O tax is fairly apportioned. This is because Washington does not tax the income of a unitary business, but rather taxes only the privileges of manufacturing or selling within the state." App. to J.S. at A-14.

> on its manufacturers—which they have every right to do—then Armco and others from out of State will pay both a manufacturing tax and a wholesale tax while sellers resident in West Virginia will pay only the manufacturing tax.

Id.[14] If other states imposed taxes like Washington's, then Appellants would pay both a manufacturing tax and a wholesaling tax, while manufacturer-sellers resident in Washington would pay only the wholesaling tax. Far from exonerating Washington's taxes, therefore, viewing them together confirms their discrimination.[15]

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[14]In the next paragraph of its opinion, the Court identified this test for discrimination as a requirement of "internal consistency." 467 U.S. at 644. The internal inconsistency in Washington's scheme results from (i) taxing *each* of an enterprise's multiple activities—i.e., extracting, manufacturing, wholesaling and retailing, and (ii) *exempting all but the last* of such activities performed within Washington. The enterprise that operates in two or more states will inevitably have a "last" activity in every state with which it has minimal contact. By contrast, the business that confines itself to purely local activities is assured of paying tax on no more than one activity.

[15]Washington has, in fact, explicitly admitted to the Court that its tax scheme is internally inconsistent:

> The discrimination argument we consider here . . . would arise from the combined effects of two tax systems: that of West Virginia and that of another state should it also choose to adopt the same system as West Virginia. If Armco were subject to both states' systems, because it manufactured in one state and sold the product so manufactured in the other, the combined taxes would be greater than the tax imposed on Armco by West Virginia alone.
>
> . . . That same possibility exists under Washington's business and occupation tax . . . .

Brief of the State of Washington as Amicus Curiae at 18, *Armco, Inc. v. Hardesty*, 467 U.S. 638 (1984). *See also* App. K to J.S. ("executive briefing" chart used to explain Washington's "*Armco* problem" to the state legislature). The chart graphically reveals that Washington's scheme results in "2 taxes" on interstate commerce, but only "1 tax" for wholly local commerce.

B. The Washington Manufacturing Tax and Selling Taxes Are Not Compensatory.

The "compensatory" rationale is wrong as well as futile. Washington's taxes are imposed on the same events as West Virginia's—events held by this Court not to be "substantially equivalent." 467 U.S. at 643. In *Armco,* West Virginia had similarly argued that it was justified in imposing its wholesaling tax on interstate business—although local business was exempt—because local business was required to pay a manufacturing tax. The Court rejected this contention because: "[M]anufacturing and wholesaling are not 'substantially equivalent events' such that the heavy tax on in-state manufacturers can be said to compensate for the admittedly lighter burden placed on wholesalers from out of State." *Id.*

Acknowledging this Court's explicit holding on the point (App. to J.S. at A-7), the court below finessed the *Armco* analysis by reversing it. Ignoring the threshold requirement that the taxes be imposed on "substantially equivalent events," the court shifted its focus to the mechanical structure of the tax system—concluding that it was consistent with a compensatory tax theory.[16] The Court reasoned *from* that

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[16]The court below accepted Washington's newly devised argument that its taxes "differ significantly" from West Virginia's. App. to J.S. at A-7. The alleged point of difference is in the relative amounts of tax imposed on manufacturing versus selling by the two states. The Washington court seemed to premise its structural analysis on a patent misunderstanding of the tax struck down in *Armco.* The court below erroneously stated that West Virginia's wholesaling tax on interstate businesses was imposed at a rate of 0.88%, while the manufacturing tax imposed on local businesses was imposed at a much lower rate of 0.27%. App. to J.S. at A-7. (If true, such a disparity would, of course, have been an obvious discrimination.) In reality, however, the West Virginia tax rates were *exactly opposite* those stated by the Washington court—as this Court noted in *Armco. See* 467 U.S. at 640 n.2, 641 & n.5. Thus, this Court's conclusions were reached despite local business having been taxed on manufacturing at a rate over three times the wholesaling tax rate imposed on interstate commerce. This Court was unable to say which portion—if any—of West Virginia's manufacturing tax was attributable to manufacturing, and which portion to selling. Washington's taxes present the same problem.

conclusion *back* to a holding that manufacturing and selling must, therefore, be substantially equivalent events—in Washington, if nowhere else. App. to J.S. at A-9.[17]

This attempted evasion is refuted by an earlier admission made to this Court. When *Armco* was being considered, Washington sought this Court's consideration of its *amicus* brief by pointing out that "[t]he Washington business and occupation tax . . . is a gross receipts tax very similar to the West Virginia tax." Brief of State of Washington as Amicus Curiae at 1, *Armco, Inc. v. Hardesty,* 467 U.S. 638 (1984). Now Washington has retreated from its prior candor and asserts that its taxes "differ significantly" from West Virginia's. Despite Washington's new view of its taxes, what was fatal to West Virginia's "compensating" claim is likewise fatal to Washington's. The taxes claimed to be "compensatory" are imposed on manufacturing and wholesaling—events that are no more equivalent in Washington than they are in West Virginia.

III. WASHINGTON'S TAXES ARE NOT FAIRLY APPORTIONED, AS REQUIRED BY THE COMMERCE CLAUSE.

Besides their impermissible discrimination, the challenged taxes are invalid for another, independent reason. They are not fairly apportioned.

State taxes must be fairly apportioned. *See Gwin, White &*

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[17]Nor would it follow that Washington's taxes are "compensatory" merely because of alleged structural similarity. *See, e.g., Maryland v. Louisiana,* 451 U.S. 725 (1981). The taxes there were structurally identical —having precisely the same rates and measures. *Id.* at 731; *see also, Armco,* 467 U.S. at 642-43. Nevertheless, the taxes were held not compensatory because they were not imposed on substantially equivalent events. 451 U.S. at 759. *See also Columbia Steel Co. v. State,* 30 Wash. 2d 658, 192 P.2d 976 (1948), *cited with approval, Armco,* 467 U.S. at 642 & 645 n.8. In *Columbia Steel,* the 1948 version of Washington's own selling tax discriminated against interstate commerce even though local commerce paid a manufacturing tax at an identical rate on the same base.

Prince, Inc. v. Henneford, 305 U.S. 434, 438-39 (1939); and *Complete Auto Transit, Inc. v. Brady,* 430 U.S. 274, 278 (1977). In *Gwin, White & Prince,* this Court struck down a Washington gross receipts tax because it was unapportioned.[18] The taxpayer conducted its business (commission selling) in more than one state. The Washington Supreme Court sustained a tax on 100% of the business's receipts. This Court reversed because "other states to which the commerce extends may, with equal right, lay a tax similarly measured." 305 U.S. at 439.

The same problem is present here. The manufacturing and selling business of each Appellant is conducted in more than one state. In a decision heavily relied upon by the court below, *General Motors Corp. v. Washington,* 377 U.S. 436 (1964), this Court characterized Washington's wholesaling tax as "unapportioned and . . . therefore, suspect." *Id.* at 448.[19]

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[18]Washington now apportions that particular tax. *See* Wash. Rev. Code §§ 82.04.460 & 82.04.290 ("tax on other business or service activities").

[19]*See also Standard Pressed Steel Co. v. State,* 419 U.S. 560 (1975), again involving Washington's wholesaling tax, "levied on the unapportioned gross receipts of appellant resulting from its sale of fasteners to Boeing." *Id.* at 561-62. (Compare the observation, *id.* at 563-64, that the tax was " 'apportioned exactly to the activities taxed,' all of which [were] intrastate.") Washington's manufacturing tax was not before the Court in *General Motors* or *Standard Pressed Steel.*

The 5-justice majority in *General Motors* did not address the discrimination issue presented here. 377 U.S. at 457 (Goldberg, Stewart, and White, JJ., dissenting). Nor did it consider the requirement of internal consistency, articulated in *Container Corp. of America v. Franchise Tax Board,* 463 U.S. 159, 169 (1983), and applied in *Armco, Inc. v. Hardesty,* 467 U.S. 638, 644 (1984). Rather, the majority opinion (and the brief opinion in *Standard Pressed Steel* that followed it) focused on a nexus issue not present in this appeal of National Can *et al.* At the end, the majority addressed briefly the question of actual multiple imposition, finding the taxpayer's proof insufficient—a deficiency not present in the instant stipulated record reflecting multiple taxation. J.A. 174-82, 184-85 and 189-92.

Unlike the majority, the four Justices dissenting in *General Motors* reached discrimination and apportionment issues. Justice Brennan would

Here, Washington's manufacturing tax and selling taxes are based on 100% of the gross receipts from Appellants' activities in Washington and other states. J.A. 174-76, 178-81, 184-85, and 189-91. These other states have the same right as Washington to levy taxes on this commerce. The taxes challenged here thus have the same vice that the Court condemned in *Gwin, White & Prince.* Moreover, other states *do* levy taxes on Appellants, apportioned to their activities in those states, on the same receipts that are part of Washington's unapportioned tax base. J.A. 176-77, 181-82, and 191-92.

The challenged Washington taxes are therefore unconstitutional for lack of fair apportionment. For a more thorough discussion of this constitutional defect, see Brief of Amici Curiae Amcord, Inc., *et al.* in Support of the Appellants.

CONCLUSION

For the reasons expressed above, Appellants ask that the decision below be reversed.

Dated: November 19, 1986.

Respectfully submitted,

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have required apportionment because "if commercial activity in more than one State results in a sale in one of them, that State may not claim as all its own the gross receipts to which the activity within its borders has contributed only a part." 377 U.S. at 451. Justices Goldberg, Stewart, and White anticipated the *Armco* holding by addressing the discrimination and multiple burden problems, and concluding that the Washington tax failed to satisfy Commerce Clause requirements. 377 U.S. at 457-62.

APPENDIX

RULE 28.1 DESIGNATION

Pursuant to Rule 28.1, Appellants state that the only changes to their original Designation of Corporate Relationships, App. G to J.S., as amended by footnote 1 to the Brief in Opposition to Motion to Dismiss or Affirm are: Allis-Chalmers Power Systems, Inc. is now a subsidiary of, and Pension Benefit Guaranty Corporation now owns 5% or more of, Appellant Allis-Chalmers Corporation. The following are no longer subsidiaries or affiliates of Appellant Bethlehem Steel Corporation: Southeast, Incorporated, Erie Mining Company, A Limited Partnership, Met-Mex Penoles, S.A. de C.V. and Minera Apolo, S.A. de C.V.; the correct name of one of Bethlehem Steel Corporation's subsidiaries is Mineracoes Brasileiras Reunidas MBR. Peugeot Company S.A. is no longer a subsidiary of Appellant Chrysler Corporation. Williams Equine Products, Inc. is affiliated with Appellant Cummins Engine. The only entities now owning 5% or more of Appellant Data I/O Corporation are Bruce E. Gladstone and The Independent Investment Company, Ltd. The Dyson Kissner Moran Corporation and B.S.D. Diversified Co., Inc. are the correct names of two parents of Appellants Fentron Building Products Co., Heath Tecna Aerospace Co. and Korry Electronics Co., all divisions of Criton Technologies. Starnet Corporation is no longer a subsidiary of, and Ceradyne Advanced Products, Inc. and First Nationwide Network, Inc. are now subsidiaries of, Appellant Ford Motor Company. Mattel Molds, Ltd. (Taiwan) is no longer, and Ma-ba Corporation (Japan) is now, a subsidiary of Appellant Mattel, Inc. Templeton, Galbraith & Hansberger, Ltd. and Wellington Management Co./Thorndyke, Doran, Paine & Lewis are the correct names of some of Appellant Reynolds Metals Company's parents; Robertshaw Controls Company is no longer a subsidiary and Jamaica Reynolds Bauxite Partners, Jefferson Village Associates, Reynolds Metals Company & Associate, L.P. and Eastwick Joint Venture are no longer affiliates of Reynolds Metals Company; Austria Dosen GmbH, Reynolds Aluminium

Holdinggesellschaft mbH, RMC Holdings (Delaware), Inc., Austria Dosen Gesellschaft mbH & Co. KG, 1401 17th Street Associates, Crown Oak Associates of Penfield, Gerro Reynolds Dosenwerk GmbH & Co. KG, Kimbrook Manor Associates, Lakeside Village Associates, Ltd. and LaSalle Square Associates are now affiliates of Reynolds Metals Company. Appellant Scott Paper Company is no longer affiliated with The Bowater-Scott Corporation of Australia, Ltd., Papeles Scott de Columbia, S.A. or Bowater-Scott Corporation Limited; Canso Chemicals Limited and Compania Industrial de San Cristobal are the correct names of two of Scott Paper Company's affiliates.

(1) (9)

Nos. 85-1963 and 85-2006

Supreme Court, U.S.
FILED
DEC 24 1986
JOSEPH F. SPANIOL, JR.
CLERK

SUPREME COURT
OF THE
UNITED STATES

OCTOBER TERM, 1986

TYLER PIPE INDUSTRIES, INC.,

Appellant,

v.

STATE OF WASHINGTON
DEPARTMENT OF REVENUE,

Appellee.

NATIONAL CAN CORPORATION, et. al.,

Appellants,

v.

STATE OF WASHINGTON
DEPARTMENT OF REVENUE,

Appellee.

ON APPEAL FROM THE
SUPREME COURT OF WASHINGTON

BRIEF FOR APPELLEE

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QUESTIONS PRESENTED

Washington imposes a tax on the business activities of selling and manufacturing, within the state, measured by the gross proceeds derived from those activities. The tax applies at essentially the same rate and measure to (1) the in-state manufacture of goods sold elsewhere; (2) the in-state sale of goods manufactured elsewhere; and (3) the in-state sale of goods both manufactured and sold in state.

This case presents the following questions regarding that tax:

(1) May Washington impose its selling tax on goods manufactured elsewhere and sold in Washington if it also imposes its selling tax, at the same rate and measure, on goods both manufactured and sold in Washington?

(2) May Washington impose its manufacturing tax on goods manufactured in Washington and sold elsewhere if it also imposes its selling tax, at the same rate and measure as the manufacturing tax, on goods both manufactured and sold in Washington?

(3) May Washington impose its selling tax on goods manufactured elsewhere and sold in Washington and its manufacturing tax on goods manufactured in Washington and sold elsewhere, measured by the value attributable to those activities in the state, without the requirement of further apportionment?

(4) Do the selling activities of the in-state representatives of Tyler Pipe Industries, Inc. provide sufficient nexus for the imposition of Washington's gross receipts tax on its selling in the state? If so, is such nexus avoided when the activities are performed by independent contractors rather than employees?

(5) Is a tax imposed by Washington on the selling activities of a business in the state, measured by the gross proceeds from Washington sales of its products, fairly related to the services provided by the state?

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Nos. 85-1963 and 85-2006

SUPREME COURT
OF THE
UNITED STATES

OCTOBER TERM, 1986

TYLER PIPE INDUSTRIES, INC.,

Appellant,

v.

STATE OF WASHINGTON
DEPARTMENT OF REVENUE,

Appellee.

NATIONAL CAN CORPORATION, et. al.,

Appellants,

v.

STATE OF WASHINGTON
DEPARTMENT OF REVENUE,

Appellee.

ON APPEAL FROM THE
SUPREME COURT OF WASHINGTON

BRIEF FOR APPELLEE

STATEMENT OF THE CASE

Tyler Pipe Industries, Inc. (TPI) and National Can Corporation (NCC) challenge the validity of Washington's business and occupation (B&O) taxes paid on their business activities in Washington. We begin by briefly describing the tax and the activities of TPI and NCC (The Taxpayers), respectively.

I. WASHINGTON'S B&O TAX.

Washington's B&O tax system is broad in its sweep. The keystone for that system is Wash. Rev. Code § 82.04.220,

which levies a tax "for the act or privilege of engaging in business activities". The statutory definitions of the terms used in this provision are equally broad. Thus, Wash. Rev. Code § 82.04.150 defines "engaging in business" to include "commencing, conducting, or continuing in business and also the exercise of corporate or franchise powers". "Business" is itself broadly defined in Wash. Rev. Code § 82.04.140 to include "all activities engaged in with the object of gain, benefit, or advantage". The Washington Supreme Court has accurately summarized the effect of these provisions as imposing B&O tax "upon virtually all business activities carried on within the state." *Time Oil Co. v. State*, 79 Wn.2d 143, 146, 483 P.2d 628 (1971).

A. The Selling and Manufacturing Taxes Apply, at the Same Rate and Measure, to Separate Activities That Are Functionally Related.

The Taxpayers challenge taxes imposed on the activities of selling and manufacturing. The selling tax is imposed upon every person who makes sales in Washington, either wholesale or retail. Wash. Rev. Code §§ 82.04.270 and 82.04.250. NCC J.S. E-2, -4. The manufacturing tax is imposed upon every person engaged in business as a manufacturer in Washington. Wash. Rev. Code § 82.04.240. NCC J.S. E-2.

Although selling and manufacturing are separate categories of activities, they are functionally related. One who manufactures products either sells them or puts them to use. If they are put to use, the user avoids buying them from someone else. This functional relationship is explicitly recognized in the law. A "manufacturer" is defined as one who makes products "for sale or for commercial or industrial use". Wash. Rev. Code §§ 82.04.110 and 82.04.120.

In addition to the functional relationship between selling and manufacturing, the taxes on these activities have two common characteristics. First, the selling and manufacturing taxes have the same basic rate — .0044.[1] Wash. Rev. Code §§ 82.04.240, 82.04.250 and 82.04.270. Second, the selling and

[1]During part of the period for which NCC (but not TPI) seeks a refund, a surtax was imposed in addition to the selling and manufacturing taxes. Effective July 1, 1983 a combination of the basic rate (.0044) and the surtax for wholesaling and manufacturing taxes was .00484. The combination for retailing tax was .00471. Wash. Rev. Code §§ 82.02.030, 82.04.2901 and 82.04.2904. NCC J.S. E-1, -6.

manufacturing taxes have the same measure, that is, the same base to which the rate is applied. The measure of the selling tax is the "gross proceeds of sales" in Washington. Wash. Rev. Code §§ 82.04.250 and 82.04.270. The measure of the manufacturing tax is the "value of the products" manufactured, which is determined by the "gross proceeds derived from the sale thereof". Wash. Rev. Code §§ 82.04.240 and 82.04.450. NCC J.S. E-8.

B. The Multiple Activities Exemption Operates so That Products Manufactured or Sold in Washington Bear One B&O Tax, Manufacturing or Selling.

Although selling and manufacturing are separate categories of activities, Washington does not impose both a selling and manufacturing tax with regard to the same product. This is because of the operation of the so-called multiple activities exemption, Wash. Rev. Code § 82.04.440. NCC J.S. E-8. Under this statute "persons taxable under [retailing] or [wholesaling] shall not be taxable under [manufacturing] with respect to * * * manufacturing of the products so sold".

The key is that the multiple activities exemption only applies to products actually subject to Washington's selling tax. For example, if a business manufactures and sells a chair in Washington for $1,000 it is subject to selling tax of $4.40 ($1,000 x .0044). The multiple activities exemption exempts the business from manufacturing tax for making that chair. However, the exemption from manufacturing tax obtained by paying selling tax on one product, such as a chair, applies to no other product manufactured by the business, such as a table.

To carry the example further, if a business pays no selling tax with regard to a table made in Washington, it is liable for manufacturing tax. There are two reasons why selling tax might not be paid. First, the table might be used instead of sold. Second, the table might be sold in another state. The manufacturing tax thus due is imposed at the same rate and on the same measure as the selling tax. Accordingly, if the value of the table is $1,000, the manufacturing tax due for making the table is $4.40.

The end result of these statutes is that all products sold

or manufactured in Washington are subject to one B&O tax, either selling or manufacturing. The amount of that selling and manufacturing tax will be the same because the measure of the two taxes and the rate of the two taxes are the same.

II. TPI'S ACTIVITIES IN WASHINGTON.

TPI seeks a refund of selling taxes paid on its wholesale sales delivered to Washington customers for a 57-month period, January 1, 1976 through September 30, 1980, in the amount of $130,010. TPI J.S. B-8 FF 1.[2] The sales were of pipe and other plumbing products. These were manufactured outside of Washington by one or more of TPI's subsidiary corporations and then initially sold to TPI; TPI itself does no manufacturing. TPI Br. 4; TPI J.S. B-8 FF 2; J.A. 4, 17, 23, 36, 48, 135.

TPI receives from the State of Washington police and fire protections, the availability of the courts, and "numerous other advantages of a civilized society". TPI J.S. B-12 FF 18.

On the facts in the record, including detailed findings of fact, the Washington Supreme Court found a sufficient tax nexus between TPI's activities and Washington. TPI J.S. A-1-9. TPI, however, seeks to retry the facts by offering this Court a highly selective summary, TPI Br. 3-7, which does not truly reflect the record. Accordingly, we will describe TPI's marketing operation in Washington and three categories of functions performed by its Washington representatives.

A. TPI Markets Its Products through Sales Representatives, Either Employees or Independent Contractors, Both of Whom Perform Identical Functions.

TPI's marketing division consists of two sales departments, DWV (drainage, waste, vent) and Utility. TPI J.S. B-8 FF 2; J.A. 128-29. These departments do their local marketing across the country through sales representatives, who are either employees or, as in Washington, independent contractors. TPI J.S. B-9 FF 6; J.A. 122-23, 126-27.

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[2]References to the TPI record in this section are as follows: FF refers to a Finding of Fact; RP and Ex. refer respectively to the Verbatim Report of Proceedings and individual Exhibits from the trial, in No. 85-1963.

There are no significant differences in authority and functions between the employee and contractor representatives. TPI J.S. B-11 FF 12; J.A. 61-62, 87, 124, 126-27. Both types are directed, supervised, and instructed by TPI personnel. TPI J.S. B-9 FF 5; J.A. 131-32, 134. Both the employees and contractors are paid on commission; the employees, however, receive insurance benefits and the contractors receive a little higher commission rate. J.A. 122-27. The contractor representatives are TPI's agents. J.A. 110. They do not handle any competing product lines, although they do also represent other non-competing companies. J.A. 95, 100, 152. When TPI asks them to do something, they do it. J.A. 90, 107.

For most of Washington, TPI utilizes two independent contractors. Representative Ashe & Jones performs virtually all of the sales functions in its territory for all TPI products, except those of TPI subsidiary Wade, Inc.[3] TPI J.S. B-8-9 FF 3, 6; J.A. 48-49, 137. Ashe & Jones employs "three and a half" sales people. J.A. 102. Its territory is principally the State of Washington, with half of its customers being located in Western Washington. J.A. 29, 107. During the relevant 57-month period, Ashe & Jones was involved in $22,345,110 worth of TPI Washington sales. J.A. 139. Ashe & Jones receives a commission for every TPI sale made in its territory, even if the customer forwards its order directly to TPI rather than through the representative. TPI J.S. B-9 FF 6; J.A. 97, 139. Ashe & Jones represents both the DWV and Utility departments, and its commissions are calculated on the basis of both DWV and Utility sales. TPI J.S. B-8 FF 3; J.A. 110; RP 245. Ashe & Jones pays B&O tax measured only by the sales commissions it receives. J.A. 98-99.

During the relevant 57-month period, TPI sent five of its officers or employees into Washington (one of them six times), to provide liaison with its sales representatives, for routine goodwill promotion, to attend a regional trade show, and to

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[3]The second contractor representative, Mechanical Agents, Inc., represents Wade, Inc., a wholly-owned subsidiary of TPI which markets specification drainage products. Mechanical Agents maintains an inventory of Wade products (owned by TPI/Wade) in its Seattle warehouse. TPI J.S. B-9 FF 4. Mechanical Agents employs four sales people who engage in numerous Washington activities on Wade's behalf. J.A. 113-14; RP 340. TPI is no longer contesting the taxes measured by Wade sales. TPI J.S. B-8 FF 1.

provide customer service. Ex. 14, RP 2, 85. TPI provides other assistance to its representatives also, such as in handling customer problems, calling on contractors and engineers, and closing orders. TPI J.S. B-9 FF 5; J.A. 131, 133-34.

B. TPI's Sales Representatives Regularly Provide Virtually All of TPI's Information about the Washington Market.

Washington sales representatives provide virtually all of the Washington market information obtained by TPI. This information, provided on a regular, timely basis,[4] is necessary to keep TPI competitive in the marketplace. TPI J.S. B-9-10 FF 8; J.A. 50, 124-25, 143-44. It helps TPI to complete its national picture. J.A. 67.

Ashe & Jones provides both specific and general market information. Specific information is provided about competitors' products, pricing, and activities. TPI J.S. B-10 FF 8; J.A. 49, 68, 88, 101, 104; *cf.* Ex. 50, RP 299, 300. Ashe & Jones reports on existing and potential new customers, customer financial reliability, and any special financial or other risks involved in potential sales. TPI J.S. B-10 FF 8; J.A. 84-86, 120-21, 148, 153. Information is also provided to keep TPI abreast of competitive and market conditions and business activity in general. This includes vital feedback about market trends, construction activity, "bellwether" contractors, prospective orders, product performance, and personnel and ownership changes in the trade. TPI J.S. B-10 FF 8; J.A. 49, 50-51, 55, 68, 95, 99, 102.

C. TPI's Sales Representatives Solicit and Process Orders from Washington Customers.

TPI's sales representatives regularly call on the trade for TPI to promote sales and solicit orders from wholesalers. TPI J.S. B-10 FF 9; J.A. 55, 103, 146. They also regularly receive specific orders and transmit them to TPI. TPI J.S. B-10 FF 9;

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[4]Ashe & Jones personnel communicate by telephone with TPI personnel about a dozen times a week, including communications "quite often" (about 3 to 5 times a week) with the Utility department in particular. RP 255-56, 276-80. These communications are used to convey to both the DWV and Utility departments the described market information obtained from calls on the trade and to transmit and coordinate specific orders. J.A. 55, 68, 99-101, 107.

J.A. 96, 162. Ashe & Jones talks to TPI's DWV order desk approximately 2 or 3 times a week to place orders, and to its Utility order desk about once every other week. RP 275-76, 278.[5]

During the relevant period, Ashe & Jones transmitted to TPI 55.04% of TPI's total orders from Washington customers (excluding Wade). Stated another way, Ashe & Jones transmitted no Utility orders but 98% of the remaining non-Wade orders. J.A. 162.[6] TPI did not reject any order transmitted by a Washington sales representative. TPI J.S. B-11 FF 13; J.A. 150.

D. TPI's Sales Representatives Develop and Maintain the Washington Market for TPI Products.

Ashe & Jones personnel generate future orders by spending a significant part of their time making "secondary calls" to persuade Washington engineers, architects, and contractors (the customers of TPI's customers) to specify and use both DWV and Utility products in their projects. TPI J.S. B-10 FF 10; J.A. 55, 102-03. Sometimes these calls are in response to inquiries triggered by advertising. J.A. 58. The representative provides price quotations of TPI products for specific construction projects. TPI J.S. B-10 FF 10; J.A. 47-48, 132, 146. These secondary calls help to maintain TPI's relationships with the engineers and contractors. J.A. 109.

After an order has been placed, the sales representative has a follow-up role. If a Washington customer has a problem with shortages, non-conforming goods, or the amount of an invoice, that customer generally contacts TPI's local sales representative, who will participate in investigating and handling any adjustment. TPI J.S. B-10 FF 10; J.A. 59, 106. These contacts, about both DWV and Utility products, are made with Ashe & Jones about 10 to 12 times a year. J.A. 88-89, 92, 104-06.

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[5]Although Ashe & Jones does not usually transmit Utility orders, it calls the Utility order desk for the purpose of coordinating Utility and DWV shipments. RP 278-79.

[6]Transmitted non-Utility non-Wade orders (4,588) divided by total non-Utility non-Wade orders (4,683) equals .979. J.A. 162.

The sales representative performs still other important services for TPI. TPI requires the sales representative to serve as the first line evaluator of a potential new customer's financial responsibility. J.A. 153 ¶ 4. The representative may make inquiries for TPI regarding late payments. TPI J.S. B-10-11 FF 10; J.A. 115, 118-19. A representative also makes other communications on TPI's behalf, such as providing counteracting sales information about specific competing products and calling on plumbing inspectors and plumbing code authorities. TPI J.S. B-10 FF 10; J.A. 55; RP 301-02; Ex. 50, RP 299, 300.

TPI's sales representatives have long-established and valuable relationships with its customers and with engineers, architects, and contractors in the trade. TPI J.S. B-9 FF 7; J.A. 103. Through their sales contacts, the representatives "keep the door open for further transactions", reminding wholesalers and others that TPI is actively soliciting their DWV and Utility business. J.A. 55, 87. The representatives maintain and improve TPI's name recognition, market share, goodwill, and customer relations. TPI J.S. B-9 FF 7; J.A. 58, 110, 149. The sales representatives are involved in *all* TPI Washington sales transactions, either actively or at least in the sense of being present, aware of the transactions, and available to assist if necessary. The sales representatives afford to TPI's customers the "presence" of TPI, because they are "there to be of benefit to the wholesaler at whatever point possible." TPI J.S. B-11 FF 11; J.A. 56.

III. NCC'S ACTIVITIES IN WASHINGTON.

NCC sells packaging products in Washington and throughout the world. These products are manufactured in twenty-two states including Washington. J.A. 178 ¶¶ 2, 3. In Washington NCC employs approximately 240 people with a payroll in 1983 of approximately $7.6 million. J.A. 179 ¶ 6. These employees are involved in the manufacture of products at the two plants located in this state. This number also includes NCC's Washington sales office. J.A. 179-80 ¶¶ 6-8.

During the period January 1, 1980 through December 31, 1984 NCC was subject to taxes on its selling and manufacturing activities in Washington. NCC paid selling tax (wholesaling) of $606,863 on the sales of products in Washington that

were manufactured elsewhere. J.A. 180 ¶ 9. This selling tax was measured by the gross proceeds of sales which ranged from $19.9 million to $32 million between 1981 and 1984. J.A. 180 ¶ 9. In contrast, NCC's worldwide sales in 1983 were approximately $1.552 billion. J.A. 181 ¶ 13.

NCC also paid manufacturing tax of $372,843 on products manufactured in Washington and sold elsewhere. J.A. 180 ¶ 10. This manufacturing tax was measured by the value of the products, as determined by their sales price, which ranged from $11.3 million to $18.7 million between 1981 and 1984. J.A. 180 ¶ 10. NCC challenges the imposition of both the selling and manufacturing taxes.

SUMMARY OF ARGUMENT

1. The one common, and in our view most important, issue is The Taxpayers' claim that Washington's B&O tax discriminates against their selling and manufacturing activities conducted within Washington. This appeal calls upon the Court once again to test such discrimination claims under the Commerce Clause parameters which govern interstate businesses and the states.

In early Commerce Clause cases, the Court observed that a case-by-case approach provided "little in the way of precise guides to the States in the exercise of their indispensable power of taxation." *See e.g., Northwestern States Portland Cement Co. v. Minnesota*, 358 U.S. 450, 457 (1959). Recently, however, the Court has identified a clear, workable "bright line" test which draws the line between (1) a system which discriminates against interstate commerce, and (2) a system which fairly encourages in-state business.

In *Boston Stock Exchange v. State Tax Commission*, 429 U.S. 318, 329, 336-37 (1977), the Court clearly set out those parameters when it contrasted tax systems which "encourage the growth and development of intrastate commerce and industry" and "compete with other states for a share of interstate commerce" with those which discriminate "by providing a direct commercial advantage to local business."

Under the test a state tax system, viewed as a whole, may neither erect barriers to the flow of goods and services into a state, nor provide inducements to a taxpayer, in the form of

reduced tax burdens, to increase its business activity within a state. These two effects are simply different sides of the same coin. If, by avoiding these consequences, the system allows to the taxpayer tax neutral decision-making, then that system is not discriminatory.

Armco, Inc. v. Hardesty, 467 U.S. 638 (1984) is in harmony with this test. Washington's challenged tax system meets the test for nondiscrimination and is thus distinguishable from the West Virginia statute invalidated in *Armco*. Nevertheless, The Taxpayers seize upon unessential language in *Armco*, dealing with concepts of compensating taxes and the internal consistency of tax systems, to argue for a different result. The Taxpayers fail, however, to deal with this Court's articulated test for discrimination. The Taxpayers would jettison the bright line test, but offer no substitution that accommodates the interests of taxing states and interstate businesses consistent with the Court's prior rulings.

2. Initially, the source and scope of the discrimination claim must be examined. Washington's tax applies to (1) businesses that manufacture within the state, (2) businesses that sell within the state, and (3) businesses that do both. The Taxpayers' discrimination claim addresses the treatment given to those businesses that conduct *both* activities within the state *with respect to the same products*. In Washington, such businesses are involved in two different sorts of business activities, but are taxed only once on the totality of in-state business activity. The Taxpayers claim that Washington discriminated when it elected to impose only one tax because two functional activities are involved in that totality. Their claim has two aspects.

The Taxpayers, representing both Washington manufacturers selling outside the state and out-of-state manufacturers selling within the state (who both pay only one Washington tax), argue that Washington's law discriminates. They argue *Armco* requires internal consistency and if other states had Washington's system, taxes would be doubled up on the interstate level but not on the intrastate level. They argue this requires striking down *both* the manufacturing tax and the selling tax.

The Taxpayers also argue Washington's tax discriminates because businesses which manufacture in state but sell out of

state pay under a manufacturing classification and those businesses which both manufacture and sell in state pay only under a selling classification pursuant to Wash. Rev. Code § 82.04.440, the multiple activities exemption. The measure and rate of the tax is identical under both classifications. The Taxpayers argue this tax, paid under the selling classification, is irrelevant because taxes on selling and manufacturing can *never* be complementary.

3. First, we apply the bright line test to each tax classification. Washington's selling tax, challenged in both cases, meets the bright line test because *all* sellers pay that tax. The same rate and the same base always apply. The tax erects no barrier to goods coming into the state and provides no inducement to taxpayers, in the form of a reduced tax burden, to move manufacturing operations into the state. *Armco* is not applicable because it involved a selling tax which did not apply to all sellers, but instead completely excluded in-state manufacturers.

A taxpayer subject to Washington's selling tax is never subject to Washington's manufacturing tax for the goods it sells in Washington, whether those goods be manufactured in Washington or elsewhere. Where the taxpayer locates its manufacturing operations has absolutely no effect on that taxpayer's tax. Such tax neutral decision-making is exactly the type of fair encouragement which this Court has approved.

Additionally, TPI's challenge to the selling tax is without merit because TPI is solely a seller, not a manufacturer. It buys the products it sells from separate subsidiaries.

4. The manufacturing tax, which is involved only in *NCC*, is not discriminatory; for taken together with the selling tax, it too allows for tax neutral decision-making. The two taxes combined neither erect a barrier to goods or services flowing into the state nor provide the prohibited inducement to the taxpayer to increase business operations within the state. For this reason, the manufacturing tax should be considered a permissible compensating tax.

The Court's prior compensating tax decisions, including *Maryland v. Louisiana*, 451 U.S. 725 (1981) on which The Taxpayers also rely, are consistent with the test we here invoke. Under those cases, the bright line (*i.e.*, "tax neutral decision-making") test is the test actually applied to determine

whether a tax is a compensating tax. Nor is *Armco* to the contrary. *Armco* did not hold, as NCC argues, that taxes on manufacturing and selling can *never* be compensatory to each other. *Armco* simply held that West Virginia, by providing different rates and measures for the two taxes, did not actually treat them as compensatory. Because the measure for the manufacturing tax could be reduced well below that for the selling tax, the West Virginia system shared the same vice as the tax systems found defective in *Boston Stock Exchange* and *Maryland v. Louisiana*. Further, NCC's overly broad reading of *Armco* is contrary to *Hinson v. Lott*, 8 Wall. 148 (1869) where a manufacturing tax was treated as compensatory to a related selling tax. To adopt NCC's reading of *Armco* results in a conceptual quagmire. Instead of the workable test which this Court has previously developed and utilized, and upon which we rely, NCC proposes a metaphysical examination into whether the events being taxed are "substantially equivalent". NCC offers no guides as to what constitutes either equivalency or substantiality under that kind of examination.

5. NCC's argument that even if the manufacturing tax is considered a compensating tax, the principle of internal consistency in *Armco* requires invalidation, is wrong. It reads *Armco* too broadly, is not supported by *Armco*'s actual language, and would render invalid compensating taxes which have previously been held valid in *Hinson* and *Southern Pacific Co. v. Gallagher*, 306 U.S. 161 (1939). That reading would invalidate as well Washington's selling tax, which presents no compensating tax issue.

The internal consistency issue is: if State A refuses to double tax the same item — for example, by foregoing the use tax if it has imposed a sales tax — must it extend like treatment to State B's sales tax through a credit or other offset? The Court has consistently refused to resolve that question. *See Henneford v. Silas Mason Co.*, 300 U.S. 577 (1937); *Southern Pacific;* and *Williams v. Vermont*, 472 U.S. ___, 105 S.Ct. 2465 (1985), a post-*Armco* case. This demonstrates that the Court's discussion in *Armco* was not intended to resolve it.

NCC's argument in support of its claim of discrimination is fundamentally flawed because, if accepted, it would result in

preferential treatment for NCC over local taxpayers. NCC seeks relief from the Washington tax on manufacturing even if it pays no tax at all on its selling activities in another state. This is hardly a claim for equal treatment with local taxpayers, who must always pay a tax.

6. Washington's tax satisfies the apportionment prong of the Commerce Clause test because it has long been settled that a state may impose (1) a tax on in-state manufacturing, measured by the gross sales of the goods so manufactured; and (2) a tax on in-state selling activities, measured by the gross sales to in-state customers generated by those activities. Further, as *Armco* confirmed, the state of manufacture and the state of sale may each impose its tax, each using the same gross proceeds as the measure; one state need not defer to the other. For both types of taxes, the requirement of fair apportionment means only that the gross proceeds used as the measure must be fairly related to the in-state activities. Contrary to the claims of The Taxpayers and *amicus* Amcord, no further diminution of the measure of the tax is required.

7. TPI clearly satisfies the nexus requirement, as found by the trial court, because TPI's sales representative in Washington, Ashe & Jones, engaged in substantial activities including gathering market information, solicitation, and market maintenance. The fact that this representative is not formally an employee, but an independent contractor, makes no difference under the rationale of *Scripto, Inc. v. Carson*, 362 U.S. 207 (1960). This contractor representative functions and is compensated in essentially the same manner as TPI's employee representatives elsewhere. TPI's further claim that the tax is not fairly related to benefits provided by the state presents no issue separate from the nexus claim, and is essentially groundless.

8. Should the Court reverse the decisions below on either the discrimination issue or the apportionment issue, such a result would constitute a significant change from the Court's prior decisions, and the Court accordingly should apply its ruling prospectively only. If, however, the Court should decide that its ruling should be applied retroactively, further remedial issues arise which, because they are so intertwined with issues of state law, should be remanded to the court below for resolution.

ARGUMENT

I. SUMMARY OF THE TAXPAYERS' CONSTITUTIONAL CLAIMS.

This case involves challenges to Washington's B&O tax under both the Commerce Clause, art. I, § 8, cl. 3, and Due Process Clause, amend. XIV, § 1, of the United States Constitution. In *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 279 (1977) the Court laid down four tests for assessing the Commerce Clause validity of a state tax: (1) there must be a sufficient connection or nexus between the interstate activities and the taxing state; (2) the tax must not discriminate against interstate commerce; (3) the tax must be fairly apportioned; and (4) the tax must be fairly related to the services provided by the state.

The Due Process Clause sets forth two additional tests: (1) there must be a minimal connection between the interstate activities and the taxing state; and (2) there must be a rational relationship between the income attributed to the state and the intrastate values of the enterprise. *Mobil Oil Corp. v. Commissioner of Taxes of Vermont*, 445 U.S. 425, 436-37 (1980). The Court has recognized that the Commerce Clause and Due Process Clause tests in the area of state taxation are similar. *National Bellas Hess, Inc. v. Department of Revenue of the State of Illinois*, 386 U.S. 753, 756 (1967).

To invalidate a state's tax, taxpayers must show that the challenged statute contravenes these standards. The Taxpayers both claim that the B&O tax violates the discrimination and fair apportionment prongs of the *Complete Auto* test. We will address these common claims first. We will then address the claims by TPI, under the Commerce and Due Process Clauses, that there is insufficient nexus for Washington to impose its tax and that the tax is not fairly related to the services provided by the state.

II. THE SELLING AND MANUFACTURING TAXES DO NOT DISCRIMINATE AGAINST INTERSTATE COMMERCE.

A. The Discrimination Prong of the Complete Auto Test Prohibits Discrimination while Permitting Fair Encouragement.

The discrimination test embodies two basic principles. First, a state is prohibited from imposing a tax "which discriminates against interstate commerce * * * by providing a direct commercial advantage to local business." *Boston Stock Exchange v. State Tax Commission*, 429 U.S. 318, 329 (1977). The second principle is the converse of the first. A state may structure its tax system "to encourage the growth and development of intrastate commerce or industry" or to "compete with other States for a share of interstate commerce" so long as it does not "discriminatorily tax the products manufactured or the business operations performed in any other State." *Boston Stock Exchange*, 429 U.S. at 336-37.

The line between the discrimination principle and the fair encouragement principle is simply this: A state tax law discriminates if it affects the direction of commerce, either by erecting barriers or by allowing an interstate business, already subject to a state's taxes, to *reduce* its tax burden in the state by *increasing* its business operations there. A state tax law constitutes fair encouragement when it treats local business and interstate commerce equally, allowing for tax neutral decision-making with regard to the direction of commerce.

The key is tax neutral decision-making with regard to the direction of commerce. Our discussion will focus on the Court's decisions establishing this proposition.

1. A tax discriminates if it erects barriers or induces nonresidents to increase their business within the state.

The Court has identified two kinds of taxes that affect the direction of interstate commerce and are thus discriminatory. The first seeks to protect local business by erecting a barrier against the flow of goods in interstate commerce. For example, in *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263 (1984), the Court struck down an excise tax on the sale of liquor because certain locally produced liquor was exempt from the tax. The result was a tax on interstate commerce but not on local business. This constituted a barrier against interstate commerce which provided a direct commercial advantage to local business.

The second type of discriminatory tax is not designed as a barrier. It seeks instead to induce an interstate business, al-

ready subject to the state's tax, to increase business activity within the state. This inducement is brought about by allowing an interstate business to *reduce* its tax burden, in the taxing state, by *increasing* its business operations there. For example, in *Westinghouse Electric Corp. v. Tully*, 466 U.S. 388 (1984) the interstate taxpayer was subject to New York's franchise tax. The tax could be reduced by the application of a credit and the amount of the credit increased as a business increased its percentage of shipping from New York ports. The Court struck down the credit because it *reduced* the business' New York tax burden, *e.g.*, from $420 to $406, if the business *increased* its percentage of shipping out of New York from zero to one hundred percent. 466 U.S. at 400 n. 9 (Table A). The Court concluded that the tax was discriminatory because it foreclosed tax neutral decisions by inducing business into New York. In the words of the Court:

> Whether the discriminatory tax diverts new business into the State or merely prevents current business from being diverted elsewhere, *it is still a discriminatory tax that "forecloses tax-neutral decisions* and * * * creates * * * an advantage" for firms operating in New York by placing "a discriminatory burden on commerce to its sister States". *Boston Stock Exchange*, 429 U.S., at 331.

466 U. S. at 406 (emphasis added).

The economic operation of the discriminatory taxes in *Bacchus* and *Westinghouse* is essentially the same. To avoid a barrier an interstate business must become a local business. Thus, an interstate business could avoid the barrier set up in *Bacchus* by moving its operation into Hawaii and qualifying for the exemption given to local business. In this way it would *increase* its business in Hawaii, while at the same time *reducing* its Hawaii tax burden.

2. Fair encouragement exists when local and interstate commerce are treated equally, allowing for tax neutral decision-making.

A state tax law constitutes fair encouragement instead of discrimination when it treats local and interstate commerce equally, allowing for tax neutral decision-making with regard to the direction of commerce. This distinction was explicitly recognized in *Boston Stock Exchange*, 429 U.S. 318 (1977)

which concerned the New York tax on stock transfers. The tax was imposed on five separate taxable events, including sales and transfer of securities. The tax applied if any one of these five events, *e.g.*, transfer, occurred in New York even if other events, *e.g.*, sale, took place in another state. However, if more than one event, *e.g.*, both sale and transfer, occurred in New York, only one tax was payable on the entire transaction. 429 U.S. at 321-22.

Prior to the 1968 amendments the amount of the tax was the same wherever the sale took place. The 1968 amendments reduced the tax but only for those selling stock in New York, *e.g.*, 30,000 shares selling at $20 per share would be subject to a maximum tax of $350 if both sold and transferred in New York and a tax of $1,500 if transferred in New York and sold elsewhere. 429 U.S. at 334. The Court struck down the 1968 amendment because "the choice of exchange * * * is not made solely on the basis of nontax criteria. Because of the * * * transfer in New York, the seller cannot escape tax liability by selling out of State, but he can substantially reduce his liability by selling in State." 429 U.S. at 331.

In dicta, the Court contrasted the discriminatory amendments with the pre-1968 tax which did not have this vice. The pre-1968 tax was neutral because:

> [*The tax*] *fell equally on all transactions regardless of the situs* of the sale. Thus, the choice of an exchange for the sale of securities that would be transferred * * * in New York was not influenced by the transfer tax; wherever the sale was made, tax liability would arise. *The flow of interstate commerce in securities was channeled neither into nor out of New York by the state tax.*

429 U.S. at 330 (emphasis added).

These decisions establish a bright line test for judging discrimination. Taxes that affect the flow of interstate commerce are discriminatory. Neutral taxes are not.

B. The Selling Tax Is Not Discriminatory because It Allows Tax Neutral Decision-Making.

The Taxpayers claim that the selling tax discriminates against interstate commerce. TPI Br. 14-17; NCC Br. 7-10. The selling tax has been sustained by the Court on three pre-

vious occasions. *General Motors Corp. v. Washington*, 377 U.S. 436 (1964); *Standard Pressed Steel Co. v. Department of Revenue of Washington*, 419 U.S. 560 (1975); *Chicago Bridge & Iron Co. v. Washington Department of Revenue*, 98 Wn.2d 814, 659 P.2d 463 (1983), *appeal dism'd*, 464 U.S. 1013 (1983). This time The Taxpayers' challenge is based primarily on *Maryland v. Louisiana*, 451 U.S. 725 (1981), although TPI also invokes *Armco, Inc. v. Hardesty*, 467 U.S. 638 (1984).

Our analysis of The Taxpayers' claim focuses on the test for discrimination. We will demonstrate that the selling tax does not create a barrier, as was the case in *Armco*, or entice interstate commerce into the state with reduced taxes, as was the case in *Maryland v. Louisiana*. The selling tax does not discriminate because it treats local and interstate commerce equally, allowing for tax neutral decision-making with regard to the direction of commerce.

1. The selling tax does not create a barrier or violate Armco because all sellers pay it.

The selling tax does not create a barrier and is not covered by *Armco*, 467 U.S. 638 (1984). In *Armco* the Court invalidated West Virginia's wholesaling tax. The flaw in the tax was that it applied *only* to sales in interstate commerce. The Court struck down the tax because "a State may not tax a transaction or incident more heavily when it crosses state lines than when it occurs entirely within the State." 467 U.S. at 642.

Washington's selling tax is not similarly flawed because it applies to *all* sales in this state. Goods manufactured in Washington and sold here are subject to selling tax and so are goods manufactured elsewhere and sold here. Washington does not tax a sales transaction more heavily when it crosses state lines.

2. An out-of-state manufacturer cannot reduce its Washington tax by manufacturing here.

The Taxpayers' main complaint with regard to the selling tax focuses on the operation of the multiple activities exemption, Wash. Rev. Code § 82.04.440, which provides that persons subject to selling tax are exempt from manufacturing tax *with respect to the product so sold*. The gravamen of their argument is that "local business is awarded an exemption from the manufacturing tax. Out-of-state manufacturers receive no comparable benefit." NCC Br. 8.

The Taxpayers' argument is frivolous. An out-of-state manufacturer, selling here, is *also* exempt from Washington's manufacturing tax, because its manufacturing activity does not take place "within this state". Wash. Rev. Code § 82.04.240. In essence The Taxpayers claim they do not receive an exemption from a manufacturing tax they never have to pay.

The selling tax and multiple activities exemption do not discriminate by enticing business into Washington, because an interstate business cannot *reduce* its tax burden in Washington by *increasing* its business here. An out-of-state manufacturer selling in Washington cannot reduce its Washington taxes by moving its manufacturing operation into this state. For example, a business that manufactures $1,000 of goods elsewhere and sells them in Washington pays a selling tax of $4.40 ($1,000 x .0044). The business pays precisely the same amount of selling tax, $4.40, if it moves its manufacturing operations into Washington and both manufactures and sells in this state. In neither case is the business subject to Washington manufacturing tax. Thus, the selling tax does not violate the test for discrimination laid down by the Court.

The Taxpayers try to show discrimination by comparing the business activities of local and interstate commerce without regard to the Washington tax their *goods* must bear. TPI Br. 15-16; NCC Br. 10. The Taxpayers' argument is simply this: A local business that both manufactures and sells a chair in Washington for $1,000 engages in two business activities in this state (selling and manufacturing) and pays a selling tax of $4.40. An interstate business that manufactures a chair elsewhere and sells it in Washington for $1,000 engages in one business activity in Washington (selling) and pays a selling tax of $4.40. The Taxpayers allege that Washington's system is discriminatory because a local business can engage in two business activities for the price of one.

The flaw in The Taxpayers' activity analysis is that it ignores the test for discrimination laid down by the Court. The Court has consistently looked to the "practical operation" of the tax to determine if it discriminated against interstate commerce. *Halliburton Oil Well Cementing Co. v. Reily*, 373 U.S. 64, 69 (1963). Thus, the Court has consistently judged discrimination based on the relative tax burdens imposed on the

products of local and interstate commerce, even when the taxes are imposed on privileges relating to those products, as in this case.

For example, in *Henneford v. Silas Mason Co.*, 300 U.S. 577 (1937) the Court considered the validity of Washington's use tax. Under the statute Washington imposed a tax on retail sales and a use tax for the privilege of using, within this state, any article of tangible personal property. The law also contained a provision similar to the multiple activities exemption which provided that use tax was not due if retail sales tax was paid. As in this case, the sales and use taxes were imposed on privileges. If one focuses solely on the activities, the sales and use taxes allow two for the price of one. Thus, a person buying a product locally engages in two taxable privileges, sales and use, but pays only retail sales tax. A person who buys elsewhere and brings a product into Washington engages in only one taxable privilege, use, but pays precisely the same tax.

The Court in *Silas Mason* sustained the imposition of use tax. It did not focus on the activities. Instead, the Court looked to the relative tax burden imposed on the goods.

> When the account is made up, the stranger from afar is subject to no greater burdens as a consequence of ownership than the dweller within the gates. *The one pays upon one activity or incident, and the other upon another, but the sum is the same when the reckoning is closed.*

300 U.S. at 584 (emphasis added).

Thus, focusing on activities does not demonstrate discrimination. The question is whether the practical operation of the tax establishes barriers or entices business into the state. Based on this test Washington's so-called "two for one" does not discriminate.

TPI's reliance on the "two for one" argument is particularly misplaced, since TPI is not a manufacturer. Products sold by TPI in Washington are manufactured by separate corporations, Tyler Pipe Industries of Texas, Inc. and Tyler Plastics Co. J.A. 135; TPI Br. 4. Even if TPI moved into Washington it would never be subject to a manufacturing tax, because it does not engage in any manufacturing activity. Thus, even if the Court concluded that the selling tax did discriminate against out-of-state manufacturers, that conclu-

sion would have no application to TPI.

Unlike the tax in *Bacchus*, 468 U.S. 263 (1984), the selling tax does not impose a barrier to interstate commerce because it is imposed on interstate and local sales alike. Unlike the taxes in *Westinghouse*, 466 U.S. 388 (1984) and *Boston Stock Exchange*, 429 U.S. 318 (1977), the tax provides no incentive for an interstate manufacturer, that sells in Washington, to move its manufacturing operation into this state — because the total Washington tax due will remain exactly the same. Thus, Washington's selling tax does not discriminate against interstate commerce. The tax treats local business and interstate commerce equally, allowing for tax neutral decision-making with regard to the direction of commerce.

3. Maryland v. Louisiana is distinguishable because a business could reduce its Louisiana tax by increasing its Louisiana business.

The Taxpayers argue that the multiple activities exemption discriminates against interstate commerce in the same way as the first use tax credit struck down in *Maryland v. Louisiana*, 451 U.S. 725 (1981). TPI Br. 16; NCC Br. 7-9. The first use tax was imposed on natural gas brought into Louisiana from the Outer Continental Shelf (OCS). Louisiana also imposed a severance tax on gas severed in Louisiana. The law provided that "an owner paying the First-Use Tax on OCS gas receives an equivalent tax credit on *any* state severance tax owed in connection with production in Louisiana." 451 U.S. at 756 (emphasis added). Thus, the credit received for paying first use tax on *OCS gas* could be applied to reduce severance tax that would otherwise be due on gas severed in Louisiana (*non-OCS*). The Court found the credit discriminatory, as it encouraged "natural gas owners involved in the production of OCS gas to invest in mineral exploration and development within Louisiana". 451 U.S. at 757. The economic incentive was that a business could *reduce* its Louisiana tax burden, *e.g.*, from $70 to $35 if it *increased* its business in Louisiana. 451 U.S. at 757 n. 28.

This is the same reason the Court struck down the taxes in *Boston Stock Exchange*, 429 U.S. 318 (1977) and *Westinghouse*, 466 U.S. 388 (1984). In each of these three cases the law was discriminatory because taxes could be *reduced*, in the

taxing state, by *increasing* business there.

The multiple activities exemption does not have this flaw. The credit in *Maryland v. Louisiana* and the multiple activities exemption differ significantly in that the multiple activities exemption only applies to products which have been subjected to selling tax. Thus, selling tax paid on the sale of a chair provides a manufacturing tax exemption on making the chair. It applies to no other product, such as a table. *See Crown Zellerbach Corp. v. State*, 45 Wn.2d 749, 756, 278 P.2d 305 (1954). As a result, the multiple activities exemption does not result in reduced Washington tax. In contrast, in *Maryland v. Louisiana* the first use tax on OCS gas was applied to a completely different product, non-OCS gas. The credit reduced taxes in Louisiana by lowering or eliminating a severance tax which would otherwise be paid.

C. The Manufacturing Tax Is Not Discriminatory, since It Complements the Selling Tax; Both Taxes Apply Equally to Commerce, Allowing Tax Neutral Decision-Making.

NCC also challenges the imposition of manufacturing tax on goods it manufactures in Washington and sells elsewhere. Since the goods are sold elsewhere, there is no selling tax paid on the sale and the multiple activities exemption does not operate. NCC contends that the manufacturing tax thus imposed violates the discrimination prong of the *Complete Auto* test. NCC Br. 5-7. For NCC's contention to have merit one must view the manufacturing tax in isolation without reference to the selling tax.

We agree that *if* the manufacturing tax stood alone it would be discriminatory because it applies primarily to interstate commerce. However, the manufacturing tax does not stand alone. As we have seen, a Washington manufacturer who sells here is subject to selling tax. The Court has long recognized that a tax imposed primarily on interstate commerce is not discriminatory if it compensates for a tax imposed on local commerce.[7]

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[7]See Hellerstein, *Complementary Taxes as a Defense to Unconstitutional State Tax Discrimination*, 39 Tax Lawyer 405 (1986), which provides an extended view of the development of the law in this area. However, the author's proposed criteria for compensating taxes depart radically from criteria laid down by the Court.

The Court's seminal compensating tax decision, *Silas Mason*, 300 U.S. 577 (1937) illustrates the reason compensating taxes are not discriminatory. In *Silas Mason*, the Court addressed Washington's use tax and compared it to Washington's retail sales tax. The rate and measure of these two taxes were the same. Washington law also exempted from the use tax goods subject to retail sales tax. 300 U.S. at 579-81. As a result, the use tax applied primarily to goods purchased out of state and brought into Washington. The Court ruled there was no discrimination because:

> Equality exists when the chattel subjected to the use tax is bought in another state and then carried into Washington. It exists when the imported chattel is shipped from the state of origin under an order received directly from the state of destination. In each situation the burden borne by the owner is balanced by an equal burden where the sale is strictly local.

300 U.S. at 584.

Thus, compensating taxes do not discriminate because, when the two taxes are considered together, local business and interstate commerce are treated equally, allowing for tax neutral decision-making. As the Court said in *Boston Stock Exchange*, 429 U.S. 318, 332 (1977):

> In all the use tax cases, *an individual faced with the choice of an in-state or out-of-state purchase could make that choice without regard to the tax consequences.* If he purchased in State, he paid a sales tax; if he purchased out of State but carried the article back for use in State, he paid a use tax of the same amount. The taxes treated both transactions in the same manner. (Emphasis added.)

With this background, we begin our analysis by explaining the criteria for establishing a compensating tax. We will then focus on NCC's lone argument that the manufacturing tax is not a compensating tax. Finally, we will demonstrate that the manufacturing tax meets the compensating tax criteria laid down by the Court.

1. **Compensating taxes must be designed to achieve equality and actually result in equal treatment of local and interstate commerce.**

"The common thread running through the cases uphold-

ing compensatory taxes is the equality of treatment between local and interstate commerce." *Maryland v. Louisiana*, 451 U.S. 725, 759 (1981). This equality exists if the two taxes being compared are designed to achieve equality *and* actually result in equal treatment of in-state and out-of-state taxpayers similarly situated. Taxes that do not meet both criteria are not compensating taxes.

For example, in *Maryland v. Louisiana*, the first use tax and severance tax were not designed to achieve equality. Although the rate and measure of the two taxes were the same:

> [T]he pattern of credits and exemptions allowed under the Louisiana statute undeniably violates this principle of equality. As we have said, OCS gas may generally be consumed in Louisiana without the burden of the First-Use Tax. Its principle application is to gas moving out of the State. Of course, it does equalize the tax burdens on OCS gas leaving the State and Louisiana gas going into the interstate market. But this sort of equalization is not the kind of "compensating" effect that our cases have recognized.

451 U.S. at 759.

Even two taxes designed to achieve equality are not compensating taxes unless they actually result in equal treatment of local and interstate commerce. For example, in *Halliburton*, 373 U.S. 64 (1963), the Court struck down Louisiana's use tax even though the state also imposed a retail sales tax in the same pattern approved in *Silas Mason*, 300 U.S. 577 (1937). Obviously, a sales and use tax are designed to achieve equality, but the Louisiana use tax did not actually achieve it. Although the rate of the two taxes was the same, the measure of the use tax was higher because it included labor and shop overhead. The measure of the sales tax did not. *Halliburton*, 373 U.S. at 67. The Court refused to sustain the use tax because "disparate treatment would be an incentive to locate within Louisiana". 373 U.S. at 72.

2. Armco does not stand for the proposition that Washington's manufacturing and selling taxes are not compensating taxes.

NCC's main challenge to the manufacturing tax is predicated on its contention that Washington's selling and manu-

facturing taxes are not compensating taxes. NCC Br. 14-15. NCC's compensating tax argument is based solely on the passage in *Armco*, 467 U.S. 638, 643 (1984). stating that manufacturing and wholesaling are not "substantially equivalent events". NCC Br. 14. From this phrase NCC concludes that no tax on manufacturing can ever compensate for a tax on selling, even if both taxes treat local business and interstate commerce in an equal manner.

NCC's argument is wrong for four reasons. First, the argument totally ignores the basis for all of the Court's compensating tax decisions, which is: are the taxes designed to achieve equality and do they actually result in equal treatment of local and interstate commerce? The Court has consistently applied these criteria in its decisions sustaining the compensating tax, as in *Silas Mason*, 300 U.S. 577 (1937), and its decisions striking down noncompensating taxes, as in *Halliburton*, 373 U.S. 64 (1963).

Even *Maryland v. Louisiana*, 451 U.S. 725 (1981), where the phrase "substantially equivalent event" first appears, was decided on this basis. In *Maryland v. Louisiana* the Court's decision was not based on some notion of the equivalency of events. It was based on the fact that Louisiana's taxing statutes were not designed to achieve equality. The Court stated:

> The two events [severance in Louisiana of non-OCS gas and use of OCS gas in Louisiana] are not comparable in the same fashion as a use tax complements a sales tax. In that case, a State is attempting to impose a tax on a substantially equivalent event to assure uniform treatment of goods and materials to be consumed in the State. No such equality exists in this instance. * * * [T]he pattern of credits and exemptions allowed under the Louisiana statute undeniably violates this principle of equality.

451 U.S. at 759. Thus, NCC's reliance on a substantially equivalent events test constitutes a radical departure from the compensating tax criteria evolved by the Court over the years.

The second flaw is that NCC misreads *Armco*. That case does not stand for the proposition that selling and manufacturing taxes can never be compensating taxes, any more than *Halliburton* stands for the proposition that sales and use taxes can never be compensating taxes. NCC takes the phrase "substantially equivalent events" out of context. What the Court actually said was:

> *Here, too,* manufacturing and wholesaling are not "substantially equivalent events" such that the heavy tax on in-state manufacturers can be paid to compensate for the admittedly lighter burden placed on wholesalers from out of State.

Armco, 467 U.S. at 643 (emphasis added). When the phrase is placed in context, it is apparent that the Court is speaking only of West Virginia's wholesaling and manufacturing taxes, not selling and manufacturing taxes in general.

The Court went on to analyze West Virginia's wholesaling and manufacturing taxes based on the traditional criteria for identifying a compensating tax. The Court concluded that the manufacturing and wholesaling taxes were not designed to achieve equality because of differences in the rate and measure of the two taxes. The Court's analysis continues:

> Manufacturing frequently entails selling in the State, but we cannot say which portion of the manufacturing tax is attributable to manufacturing, and which portion to sales. The fact that the manufacturing tax is not reduced when a West Virginia manufacturer sells its goods out of State, and that it is reduced when part of the manufacturing takes place out of State, makes clear that the manufacturing tax is just that, and not in part a proxy for the gross receipts tax imposed on Armco and other sellers from other States.

467 U.S. at 643 (footnotes omitted). Thus, it was the practical difference in the rate and measure of the two taxes that led the Court to rule that they were not compensating taxes. The Court did not base its analysis on the non-equivalence of manufacturing and selling.

It should also be noted that West Virginia's taxes did not actually result in equal treatment of local and interstate commerce. Since the measure of the manufacturing tax was reduced if part of the manufacturing took place outside the state, the possibility existed that the lower tax base could outweigh the effects of the higher manufacturing tax rate. In such cases, the West Virginia tax burden would actually be *reduced* by *increasing* the taxpayer's manufacturing activity in West Virginia.[8] Of course, this was also the basis for striking down

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[8]For example, a product manufactured elsewhere and sold in West Virginia for $1,000 was subject to wholesaling tax of $2.70 ($1,000 x .0027). If the same product was manufactured partially within and without West Vir-

the taxes in *Boston Stock Exchange*, 429 U.S. 318 (1977); *Maryland v. Louisiana;* and *Westinghouse*, 466 U.S. 388 (1984).

The third reason NCC's compensating tax argument is wrong is that it directly conflicts with *Hinson v. Lott*, 8 Wall. 148 (1869). The Court there held that taxes on a selling activity and a manufacturing activity were compensating taxes. In *Hinson* the plaintiff challenged an Alabama tax on the introduction of liquor into the state for sale. The tax was measured by the number of gallons imported and the rate of tax was 50¢ per gallon. On its face this tax appears discriminatory because it was imposed only on liquor brought into Alabama from other states. However, the Court sustained the tax because Alabama also imposed a tax on liquor manufactured in the state, at precisely the same rate and measure as the challenged tax — 50¢ per gallon. When the two taxes were considered together, the Court concluded that the challenged tax was non-discriminatory because "no greater tax is laid on liquors brought into the State than on those manufactured within it." 8 Wall. at 153.

A flat rule that manufacturing and selling can never be substantially equivalent events would be completely inconsistent with *Hinson*. The relevance and importance of *Hinson* stems not just from its holding, but also from the fact that it was cited as controlling in *Silas Mason*, 300 U.S. at 585. Thus, in what generally is viewed as the Court's most important compensating tax decision, a tax on manufacturing and a tax upon importation for sale were clearly treated as compensating taxes.

The fourth reason NCC's argument is wrong is that its reading of *Armco* results in an essentially meaningless test.[9] NCC claims that taxes must be on "substantially equivalent events" to have a valid compensating tax. NCC Br. 15 n. 17. Yet NCC does not explain how such a test is to be applied, short of weighing the equivalence of various activities on some metaphysical scale.

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ginia and if the manufacturing tax base was reduced from $1,000 to $250, then the manufacturing tax on the same product sold in West Virginia would be $2.20 ($250 x .0088).

[9] "[T]he formal differences in the legal incidences of the two taxes do not provide an analytically defensible ground of distinction." Hellerstein, *supra* p. 22 n. 7, at 432.

The problem with NCC's proposed test can be demonstrated by comparing the equivalence of the activities of sales and use with the equivalence of the activities of manufacturing and selling. *Silas Mason* establishes that a use tax on the privilege of use can be a valid compensating tax for a retail sales tax imposed on the activity of purchasing at retail. Thus, even NCC must concede that sales and use taxes are imposed on substantially equivalent events.

However, no logical distinction exists between the substantial equivalence of the activities of sales and use and the substantial equivalence of the activities of manufacturing and selling. Sales and use are separate and distinct activities. There can be use without sale, but there cannot be a retail sale without use. Similarly, manufacturing and selling are separate activities. There can be manufacturing without a sale, but there cannot be a sale of manufactured articles without manufacturing. Indeed, the Court recognized the similarity in these two sets of relationships in *Silas Mason* where the Court cited *Hinson* to support its conclusion that the use tax was a valid compensating tax for the sales tax. *Silas Mason*, 300 U.S. at 585.

NCC's substantially equivalent events test does not withstand analysis. It is inconsistent with compensating tax criteria laid down by the Court. The test is based on a misreading of *Armco* and is directly contrary to the Court's holding in *Hinson*. Finally, the test is of no analytical value whatsoever.

3. The selling and manufacturing taxes are designed to achieve equality and actually result in equal treatment of local and interstate commerce.

Washington's manufacturing tax meets the compensating tax criteria laid down by the Court. First, the selling and manufacturing taxes are designed to achieve equality. Unlike the West Virginia wholesaling and manufacturing taxes in *Armco*, 467 U.S. 638 (1984), Washington's selling and manufacturing taxes have the same rate and measure. They are designed to tax equally all goods sold or manufactured in Washington.[10]

[10]The complementary operation of the two taxes is a neutral consideration for in-state manufacturers deciding where to market their products, and thus in contrast to those state regulatory measures the Court has de-

The Washington Supreme Court recognized this design as early as 1954 when it rejected the precise claim made by NCC, that the manufacturing tax was discriminatory because only interstate manufacturers pay it. The Washington Supreme Court stated:

> [A]s a purely practical matter in terms of a program envisaging imposition of the business and occupation tax upon only one taxable activity, it may be said that a local manufacturer, selling in intrastate commerce, pays a business and occupation tax upon its wholesaling activity.

Crown Zellerbach Corp., 45 Wn.2d 749, 759, 278 P.2d 305 (1954).[11]

Second, the selling and manufacturing taxes actually result in equal treatment of local and interstate taxpayers similarly situated. NCC demonstrates this fact perfectly. It pays an identical tax of $4.40 ($1,000 x .0044) whether it manufactures and sells $1,000 of goods in Washington; sells goods in Washington manufactured elsewhere; or sells elsewhere goods produced in Washington.

The selling and manufacturing taxes have precisely the same economic effect as the compensating taxes in *Hinson*, 8 Wall. 148 (1869) and *Silas Mason*, 300 U.S. 577 (1937). Washington's manufacturing tax, when considered with the selling tax, does not provide a direct commercial advantage to local business. The two taxes treat local and interstate commerce in an equal manner, allowing for tax neutral decision-making. Thus, the manufacturing tax does not discriminate against interstate commerce.

D. Washington's Manufacturing Tax, a Valid Compensating Tax, Is Not Rendered Discriminatory by the Concept of Internal Consistency.

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cleared "off-limits" under the Commerce Clause. *See, e.g., New England Power Co. v. New Hampshire*, 455 U.S. 331, 339 (1982).

[11]NCC cites *Columbia Steel Co. v. State*, 30 Wn.2d 658, 192 P.2d 976 (1948) to create the impression that Washington, itself, does not view the manufacturing and selling taxes as compensating taxes. NCC Br. 15 n. 17. In *Columbia Steel* the court did not even address the question of whether the manufacturing and selling taxes should be considered together. In *Crown Zellerbach* the court considered the two taxes together and concluded that they were complementary. It is this difference in analysis that distinguishes *Columbia Steel* and *Crown Zellerbach*.

NCC raises one additional argument in relation to the compensating tax question. According to NCC: "Even if Washington's taxes are viewed as 'compensatory,' they discriminate against interstate commerce." NCC Br. 12. NCC's argument is based on the reference to internal consistency in *Armco*, 467 U.S. 638, 644 (1984). NCC Br. 12-13 n. 14.[12] We begin our analysis by showing that NCC has taken the internal consistency phrase out of context. The concept has never been used to strike down an otherwise valid compensating tax.

1. **Armco did not apply the concept of internal consistency to strike down an otherwise valid compensating tax.**

The Court in *Armco*, 467 U.S. 638 (1984) did not strike down West Virginia's wholesaling tax on the basis of "internal consistency". Once again, NCC has taken a phrase from *Armco* out of context. The Court's mention of internal consistency was dicta, the Court having concluded already that West Virginia's wholesaling tax was discriminatory because it was not a compensating tax. Despite this fact West Virginia argued that Armco be required to prove actual discriminatory impact. 467 U.S. at 644. The Court rejected this argument stating:

> This is not the test. In *Container Corp. of America v. Franchise Tax Board*, 463 U.S. 159, 169 (1983), the Court noted that a tax must have "what might be called internal consistency — that is the [tax] must be such that, if applied by every jurisdiction," there would be no impermissible interference with free trade.

467 U.S. at 644. The Court carefully limited its discussion in *Armco* to situations where a tax is *facially discriminatory*:

> In [*Container*], the Court was discussing the requirement that a tax be fairly apportioned to reflect the business conducted in the State. *A similar rule applies where the allegation is that a tax on its face discriminates against interstate commerce.*

467 U.S. at 644 (emphasis added).

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[12]Even if the Court in *Armco* intended to apply internal consistency to a compensating tax, its application would be limited to Washington's manufacturing tax. It would not apply to Washington's selling tax which is imposed on *all* sales in Washington. Thus, in *Armco* when the Court struck down the wholesaling tax there was no indication that the manufacturing tax which was imposed on *all* West Virginia manufacturers was similarly invalid.

Obviously, the reference to internal consistency does not apply to a valid compensating tax. By definition a compensating tax does not discriminate on its face against interstate commerce because local and interstate businesses are treated in an equal manner.

2. NCC's internal consistency test conflicts with the Court's compensating tax decisions.

NCC's argument is wrong because it would result in striking down compensating taxes specifically approved by the Court. Under NCC's test the challenged taxes of State A are projected into State B. NCC claims that even valid compensating taxes are discriminatory if interstate commerce pays two taxes *e.g.*, one in State A and one in State B, and local business pays one tax.

Under this test the compensating taxes in both *Hinson*, 8 Wall. 148 (1869) and *Southern Pacific Co. v. Gallagher*, 306 U.S. 161 (1939) would be adjudged discriminatory. If the Alabama taxes approved in *Hinson* were projected into another state, *e.g.*, State A, the result would be as follows: An interstate business pays two taxes, the State A tax on manufacturing liquor and the Alabama tax on introducing liquor into the state for sale. On the other hand, a local business manufacturing and selling liquor in Alabama pays one tax, the Alabama manufacturing tax. The result is the same for the situation addressed in *Southern Pacific* where the Court sustained the imposition of California's tax based on its earlier decision in *Silas Mason*, 300 U.S. 577 (1937). In both *Hinson* and *Southern Pacific* the Court ruled that the compensating taxes at issue were nondiscriminatory. NCC's internal consistency test is in direct conflict with these decisions.

This conflict is not coincidental. The Court has specifically refused to apply an internal consistency requirement to otherwise valid compensating taxes.

The question of internal consistency first arose in *Silas Mason*. The sales and use tax at issue there is one of the few compensating taxes approved by the Court that could pass NCC's internal consistency test. This is because Washington provided a credit against Washington use tax for sales tax paid in other states. 300 U.S. at 580-81. Thus, if Washington's sales and use taxes were projected into another state, *e.g.*, State A,

both interstate and local business would pay one tax. Interstate commerce pays sales tax in State A but no Washington use tax is due because of the credit. Similarly, a local business both buying and using goods in Washington pays one tax, Washington's sales tax. While the credit made Washington's tax internally consistent, in the sense NCC argues, the Court specifically refrained from ruling on whether the credit was constitutionally required. 300 U.S. at 587.

In *Southern Pacific* the Court sustained California's use tax even though it *lacked* internal consistency, owing to the absence of the credit provision found in the Washington system. The Court specifically refused to apply an internal consistency test by projecting California's taxes into another state because:

> It will be time enough to resolve that argument "when a taxpayer paying in the state of origin is compelled to pay again in the state of destination."[12]
>
> [12]*Henneford v. Silas Mason Co.*, 300 U.S. 577, 587.

306 U.S. at 172.

In *Williams v. Vermont*, 472 U.S. ___, 105 S.Ct. 2465, 2471 (1985) the Court reaffirmed its ruling in *Southern Pacific* and again refused to consider a Commerce Clause discrimination claim based on the absence of the credit, which was really an internal consistency claim. Thus, the Court has never invalidated an otherwise valid compensating tax based on internal consistency. NCC's argument that the manufacturing tax should be struck down even though it is a valid compensating tax should be similarly rejected.

Finally, *Southern Pacific* puts into focus what is really at stake in NCC's efforts to use the concept of internal consistency to strike down an otherwise valid compensating tax. To have granted the taxpayer relief in *Southern Pacific* would have amounted to granting it preferential treatment over local taxpayers, for California relieved local taxpayers of a use tax only if a sales tax had actually been paid on the same item. The taxpayer in *Southern Pacific*, however, was claiming that it should be relieved of the use tax even if it had paid no sales tax to California *or to any other state* on that same item.

Here too, NCC is asking that Washington be required to provide relief from a compensating tax in order to offset taxes which it *in fact does not pay*, while local taxpayers obtain

tain relief from that same tax only as an offset for taxes which they *in fact do pay*, and that, as in *Southern Pacific*, amounts to a claim for preferential treatment.

III. WASHINGTON'S SELLING AND MANUFACTURING TAXES ARE PROPERLY APPORTIONED ACCORDING TO THE COURT'S PRIOR HOLDINGS.

The Taxpayers also claim that Washington's selling and manufacturing taxes violate the second prong of the *Complete Auto* test, the requirement that a tax be fairly apportioned. TPI Br. 17; NCC Br. 15-17.[13] We begin by correcting NCC's mischaracterization of the measure of the selling and manufacturing taxes. We will then review the decisions of the Court which uphold the apportionment of these taxes and show that no multiple burden exists in this case.

NCC's apportionment argument is based on its contention that "Washington's manufacturing tax and selling taxes are based on 100% of the gross receipts from [its] activities in Washington and other states" while other states can and do impose taxes on these same receipts. NCC Br. 17. NCC's description of the measure or base of Washington's selling and manufacturing taxes is incorrect.

The record proves that Washington does not base its taxes on "100% of the gross receipts" from NCC's activities in Washington and all other jurisdictions. In 1983 NCC's gross receipts from sales alone were approximately $1.552 *billion*. J.A. 181 ¶ 13. Washington's selling tax was based on approximately $110 *million*, which represents NCC's "gross proceeds of sales" in Washington that year.[14] J.A. 181 ¶ 13. The manu-

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[13]While TPI challenges the apportionment of Washington's wholesaling tax, its only argument is subsumed in its claim that the tax is not fairly related to the services provided by the state under the fourth prong of the *Complete Auto* test. We address this argument *infra*, section IV(B), pp. 42-44.

[14]Only a small part of the $110 million of Washington sales involved goods manufactured in another state. NCC's Washington sales of goods manufactured elsewhere ranged from $19.9 to $32 million between 1981 and 1984. J.A. 180 ¶ 9. In contrast, NCC's Washington sales of goods manufactured in the state ranged from $71.4 to $78.5 million between 1981 and 1984. J.A. 181 ¶ 11.

facturing tax was based on approximately $18.7 *million*,[15] which represents the "value of products" NCC manufactured in Washington and sold elsewhere, as determined by their selling price. J.A. 180 ¶ 10. Thus, NCC's Washington tax was actually based on approximately $128.7 *million* out of total gross sales receipts of approximately $1.552 *billion*.

We now turn to the Court's decisions pertaining to the measure of gross receipts taxes. The Court has consistently sustained gross receipts taxes that have been both imposed on a local activity or transaction and measured by the value of that activity or transaction.

Selling and manufacturing are both local privileges granted by the state, and another state cannot tax the privileges of engaging in selling and manufacturing activities in Washington. The Court has ruled that the delivery state is the only state that can tax the sale of goods, striking down sales taxes imposed by states other than the delivery state. *See Evco v. Jones*, 409 U.S. 91 (1972) and *J. D. Adams Manufacturing Co. v. Storen*, 304 U.S. 307 (1938). The same is true of manufacturing. Because the manufacturing activity takes place here, Washington is the only state that can tax that activity. In this respect manufacturing is similar to the severance discussed in *Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 617 (1981) where the Court stated:

> Nor is there any question here regarding apportionment or potential multiple taxation, for as the state court observed, "*the severance can occur in no other state*" *and* "*no other state can tax the severance.*" (Emphasis added.)

It is also well established that the gross proceeds of sales provide a proper value for the selling and manufacturing activities that take place in the state. In *Standard Pressed Steel*, 419 U.S. 560, 564 (1975) the Court stated that Washington's selling tax measured by the gross proceeds of sales was "apportioned exactly to the activities taxed". The Court cited this statement from *Standard Pressed Steel* with approval in *Moorman Manufacturing Co. v. Bair*, 437 U.S. 267, 280

[15]The parties' stipulation provides that NCC's annual out-of-state sales of products manufactured in Washington ranged from $11.3 to $18.7 million between 1981 and 1984. The record does not reflect a specific amount for the year 1983. J.A. 180 ¶ 10.

(1978). More recently, the imposition of Washington's selling tax, measured by the gross proceeds of sales, was approved in *Chicago Bridge & Iron*, 98 Wn.2d 814, 659 P.2d 463 (1983), *appeal dism'd*, 464 U.S. 1013 (1983). The Court has also approved manufacturing taxes measured by the value of the products, as determined by the selling price of the goods. *See American Manufacturing Co. v. St. Louis*, 250 U.S. 459, 462-63 (1919); *Western Live Stock v. Bureau of Revenue*, 303 U.S. 250, 258 (1938). As the Court stated in *Freeman v. Hewit*, 329 U.S. 249, 258 (1946): "It has long been settled that a state can levy [a manufacturing] occupation tax graduated according to the volume of manufacture."

These decisions firmly establish that the selling and manufacturing taxes are fairly apportioned. The only contrary authority cited by NCC is *Gwin, White & Prince, Inc. v. Henneford*, 305 U.S. 434 (1939). The tax in *Gwin, White* was different from the selling and manufacturing taxes. The tax was imposed on "engaging * * * in any business activity," not a local activity like selling or manufacturing, and the tax was measured by the "gross income of the business" not the value of the local activity. 305 U.S. at 435.

The Court has recognized that the analysis in *Gwin, White* does not apply to selling and manufacturing taxes like the ones at issue here. In *Standard Pressed Steel* the Court specifically distinguished *Gwin, White* in reaching its conclusion that the selling tax was "apportioned exactly to the activities taxed". 419 U.S. at 564. In *Gwin, White*, itself, the Court distinguished and approved the imposition of the manufacturing tax involved in *American Manufacturing*, 305 U.S. at 440.

The fact that a state imposes a tax on a local activity, measured by the value of that activity, does not create a multiple burden nor require additional apportionment. Incorporating the position of the *amicus curiae* Amcord, et al., NCC also argues that the use of the same gross receipts, employed to measure Washington's selling and manufacturing taxes, in the income tax base of some other state creates a prohibited multiple tax burden and thereby requires an additional apportionment of Washington's tax. The Court rejected this same contention in *Exxon Corp. v. Department of Revenue of Wisconsin*, 447 U.S. 207 (1980), where the taxpayer argued it was subject to such a multiple burden because other states im-

posed severance taxes on the extraction of oil and gas. The Court ruled that this did not constitute a multiple burden because:

> Severance taxes * * * are directed at the gross value of the mineral extracted or the quantity of production rather than the net income derived from the production activities. * * * The Wisconsin Supreme Court therefore properly concluded that "[t]he fact that the producing states may impose * * * severance taxes which have been held to be occupation taxes or property taxes does not render unfair or unconstitutional Wisconsin's efforts to reach a proportionate share of the taxpayer's income." 90 Wis.2d at 731, 281 N.W.2d at 110-11.

477 U.S. at 228-29 n. 12 (citations omitted).

Most recently, *Armco*, 467 U.S. 638, 645 (1984) indicates that there would be no constitutional infirmity if Ohio imposed a manufacturing tax and West Virginia imposed a selling tax. Yet clearly that situation would also involve the possibility of overlapping tax bases.

It is also important to remember that formulary apportionment of gross receipts taxes such as the selling and manufacturing taxes does not solve the problem of overlapping tax bases. Even if all states were required to use formulary apportionment there could still be overlapping tax bases unless the Court specified a particular type of formula, *e.g.*, three factors. This was precisely the problem before the Court in *Moorman*, 437 U.S. 267 (1978). Since Iowa used a one factor formula to apportion its income tax, there was a possibility of overlapping tax bases with other states that used three factor formulas to apportion their income taxes. The Court recognized that to cure this problem "would require national uniform rules for the division of income." 437 U.S. at 279. The Court refused to take this step because Congress was better equipped to give due consideration to the interests of the various states. 437 U.S. at 280.

IV. THE SELLING TAX IS IMPOSED ON A SUFFICIENT NEXUS AND IS FAIRLY RELATED TO SERVICES PROVIDED.

TPI raises two Commerce and Due Process Clause issues

of its own.[16] First and foremost, TPI claims that there is an insufficient nexus between its activities and the State of Washington. TPI Br. 10-13. TPI chiefly argues that the activities performed on its behalf in Washington constitute mere solicitation of sales which is insufficient to create a tax nexus. Second, TPI claims that imposition on it of the same tax rate and measure as on in-state taxpayers engaged in more activities means that the tax is not rationally or fairly related to values or services in Washington. TPI Br. 17-19.

The real nexus issue, however, is the same as it has long been: has the taxpayer "established that such services as were rendered * * * [through in-state activity] were not decisive factors in establishing and holding this market"? *General Motors*, 377 U.S. 436, 448 (1964), quoting *Norton Co. v. Department of Revenue of Illinois*, 340 U.S. 534, 538 (1951). *See Standard Pressed Steel*, 419 U.S. 560, 562 (have the in-state activities "made possible the realization and continuance of valuable contractual relations" between the taxpayer and others?). This is the decisive issue, regardless of whether the local activities consist only of "solicitation" or whether the agents performing them are employees or independent contractors. We will show that TPI has not carried its burden under this test.

TPI's second claim is refuted by the very case it cites.

A. The Solicitation and Other Local Activities Performed on TPI's Behalf Create a Sufficient Nexus for a Gross Receipts Tax.

1. Local solicitation alone creates nexus.

Contrary to TPI's first claim, in-state solicitation by state residents creates a sufficient tax nexus.

This is perhaps best illustrated by *Northwestern States Portland Cement Co. v. Minnesota*, 358 U.S. 450 (1959). The cases consolidated there each involved a taxpayer whose in-state activities consisted of regular solicitation of orders,

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[16]Even if the Court somehow rules that the selling tax is discriminatory against NCC due to the multiple activities exemption, these TPI issues will remain. TPI incurs only selling tax liability because it *engages only in selling* and does no manufacturing, not because of the multiple activities exemption. *See supra* pp. 4, 20-21. Thus, TPI cannot conceivably prevail on its discrimination claim.

through one or more employee salesmen operating from an in-state office. Orders were transmitted to and shipped from an out-of-state facility. 358 U.S. at 454-56. This Court held that net income from the interstate operations was subject to state taxation which was not discriminatory and was properly apportioned to local activities "forming sufficient nexus". 358 U.S. at 452. The Court concluded that the taxpayers' in-state activities, constituting "substantial income-producing activity in the taxing States", formed such a "nexus." 358 U.S. at 465. In short, *Northwestern States* holds that solicitation alone can create nexus.[17]

This contradicts TPI's claim that "solicitation of sales" is insufficient. TPI Br. 11. TPI cites *Robbins v. Shelby County Taxing District*, 120 U.S. 489 (1887), but the Court long ago noted that the *Robbins* rule "has been narrowly limited to fixed-sum license taxes imposed on the business of soliciting orders for the purchase of goods to be shipped interstate". *McGoldrick v. Berwind-White Coal Mining Co.*, 309 U.S. 33, 57 (1940). Here, in contrast, the B&O tax is imposed on the privilege of making sales in Washington, measured by the gross proceeds of those sales. Wash. Rev. Code §§ 82.04.220 and 82.04.270, TPI J.S. G-2-4. Moreover, even a (reasonable) license tax would likely survive now under the *Complete Auto* test.[18]

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[17]*Northwestern States* prompted enactment of Public Law 86-272, 15 U.S.C. §§ 381 *et seq.*, TPI J.S. G-1-2. *Cf.* TPI Br. A-1-5. The effect of that act is not among the Questions Presented, TPI J.S. i-ii, and thus is not before the Court. In any event, that act is inapplicable, according to the Washington Supreme Court's unchallenged holding, because the "B&O tax is not a net income tax". TPI J.S. A-9; TPI Br. 13 n. 12. Even if it did apply, the representatives' activities here go far beyond the mere "solicitation of orders" which is tax-exempt under that act, as will be reiterated momentarily. There is no basis for this Court to expand that act to these other activities, and to a gross receipts tax, when Congress itself has not seen fit to do so. The real significance of the act here is to show that Congress regarded "solicitation" by "independent contractors" as constitutionally creating a tax nexus, which directly refutes TPI's chief contention. Otherwise, there would have been no reason for the act's restrictions.

[18]*Robbins* is also inapposite because it involved non-resident solicitors and thus only barred " 'taxes upon persons passing through the state, or coming into it merely for a temporary purpose' such as itinerant drummers." *Northwestern States*, 358 U.S. at 458. Here, of course, TPI's representatives are Washington residents.

The *Northwestern States* rule that local solicitation by itself can create sufficient nexus, unlike the contrary rule urged by TPI, makes sense. There is no conceivable reason to deny recognition of nexus based upon the very local activities directly giving rise to the in-state sales.

2. **All of the local activities here create nexus.**

In focusing on solicitation, TPI dismisses the numerous other functions which the courts below found were also performed on TPI's behalf by its local representatives, as being "simply the sticks that make up the bundle of sales solicitation." TPI Br. 13 n. 11. This semantic exercise, if successful, would merely bring the case under *Northwestern States*, 358 U.S. 450 (1959). It cannot succeed, though, because the functions here go well beyond solicitation and thus also satisfy the nexus analysis in *Standard Pressed Steel*, 419 U.S. 560 (1975).

The taxpayer in *Standard Pressed Steel* was an out-of-state manufacturer with one employee, Martinson, operating from his home in Washington. His primary duty was to consult with the Boeing Company regarding its anticipated needs for aerospace fasteners and to follow up any difficulties in their use. Martinson was assisted by a group of the taxpayer's engineers who visited Boeing about three days every six weeks, for meetings he arranged. Orders and payments were sent directly to the taxpayer, not to Martinson. The State tax board found that Martinson's activities were necessary in furthering various aspects of the taxpayer's dealings with Boeing. 419 U.S. at 561. Answering the familiar question of "whether the state has given anything for which it can ask return," this Court unanimously said:

> [T]he question in the context of the present case verges on the frivolous. For [taxpayer's] employee, Martinson, with a full-time job within the State, made possible the realization and continuance of valuable contractual relations between [the taxpayer] and Boeing.

419 U.S. at 562. Thus, the Court found nexus for imposition of Washington's B&O tax based on market development and maintenance functions, without direct solicitation.

Corresponding nexus is present here. As in *Northwestern States*, TPI's representatives solicit orders and also regularly receive and transmit them to TPI. J.S. B-10 FF 9. Ashe &

Jones transmitted to TPI 55% of its total non-Wade Washington orders. J.A. 162. TPI's representatives also perform the market maintenance functions found sufficient in *Standard Pressed Steel*. They gather and regularly convey to TPI virtually all of TPI's necessary Washington market information. TPI J.S. B-9-10 FF 8. They develop and maintain TPI's Washington market, through "secondary calls" to generate future orders and other activities. TPI J.S. B-10 FF 10. In short, the activities of TPI's representatives involve *both* the solicitations of the salesmen in *Northwestern States* and the market development and maintenance functions of Martinson in *Standard Pressed Steel*.[19]

Whereas *Northwestern States* and *Standard Pressed Steel* support the finding of nexus here, the cases cited by TPI do not refute this conclusion. TPI relies particularly on *Norton*, 340 U.S. 534 (1951). TPI Br. 12–13. However, *Norton* actually found sufficient nexus in the receiving of orders. The Court held that

> the judgment attributing to the Chicago branch income from all sales that utilized it *either* in receiving the orders *or* distributing the goods was within the realm of permissible judgment. [The taxpayer] has not established that such services as were rendered by the Chicago office were not decisive factors in establishing and holding this market.

340 U.S. at 538 (emphases added). Thus, inasmuch as Ashe & Jones receives and transmits TPI orders, and given the other facts showing that its local services are decisive factors in holding the Washington market, *Norton* compels a nexus finding here.[20]

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[19]Given these pervasive local activities undertaken for TPI, we do not rely, as TPI has inferred, on the lesser nexus standard that suffices to impose use tax collection duties. TPI J.S. 13-14. *Cf. National Geographic Society v. California Board of Equalization*, 430 U.S. 551 (1977).

[20]TPI's recitation of the acts it purportedly does not perform in Washington, TPI Br. 13, ignores the activities which its local representative *does* perform. For example, TPI claims that it maintained no local office or employees in Washington, TPI Br. 4–5, 13, notwithstanding that Ashe & Jones did so on its behalf. It admits to no local office providing services and handling complaints after a sale, TPI Br. 7, 13, disregarding the finding of fact that sales representatives participate in investigating and handling customer complaints, and the evidence that such contacts with Ashe & Jones occur about 10 to 12 times a year. TPI J.S. B-10 FF 10; J.A. 106. In any event,

TPI may still argue that at least its Utility sales fall into the third category of nontaxable direct sales established in *Norton*, because Ashe & Jones generally did not transmit Utility orders. TPI Br. 13; TPI J.S. 15-16. Even this limited claim must fail in light of the evidence that virtually all of Ashe & Jones' local activities *except* order-taking were undertaken for both the DWV and Utility departments. *See, e.g.*, TPI J.S. B-9 FF 6; J.A. 48-49, 68, 84-90, 92, 99-103; TPI RP 275-79. In contrast, the majority in *Norton* concluded that the local office did *not* perform "service helpful to [the taxpayer's] competition for * * * trade" when the goods were ordered and shipped directly from the out-of-state office. 340 U.S. at 536. The *Norton* majority's observation that "no solicitors work the territory," 340 U.S. at 537, also distinguishes the present case, where active solicitors represent the Utility department, make secondary calls and solicit orders for that department, and receive commissions on Utility sales. TPI J.S. B-9 FF 6; TPI Br. 5; J.A. 95, 97, 102-03; TPI RP 245.

3. The contractor status of TPI's agent does not affect nexus.

TPI repeatedly paints the facts as if the local activities of Ashe & Jones were not even before the Court. If that were the case, there concededly would be little basis for a nexus finding under current law. On the other hand, if Ashe & Jones were TPI employees instead of contractors, nexus would be established beyond dispute by *Northwestern States*, 358 U.S. 450 (1959) and *Standard Pressed Steel*, 419 U.S. 560 (1975).

Two considerations compel a conclusion that the requisite nexus also exists here whether contractors or employees are involved. First, as a factual matter, there are no significant differences in how TPI's contractor representatives in Washington and employee representatives elsewhere solicit and process orders or otherwise "call on the trade". TPI J.S. B-11 FF 12.[21] Second, under this Court's decisions there also is no difference in the tax consequences.

TPI's recitation completely ignores such significant Ashe & Jones activities as market information-gathering and "secondary calls" to generate future orders.

[21]TPI has never disputed this fact, even now in reporting the state court's view of "the sales functions of Ashe & Jones as essentially identical to those of factory salesmen." TPI Br. 13 n. 11.

Scripto, Inc. v. Carson, 362 U.S. 207 (1960) so held, in finding sufficient nexus from the in-state activities of independent contractors to impose use tax collection liability on an out-of-state seller. The Court said that it does not matter for nexus purposes that a taxpayer's "salesmen" are not regular employees devoting full time to its service:

> [S]uch a fine distinction is without constitutional significance. The formal shift in the contractual tagging of the salesman as "independent" neither results in changing his local function of solicitation nor bears upon its effectiveness in securing a substantial flow of goods into [the taxing state].

362 U.S. at 211. As this Court further explained, "To permit such formal 'contractual shifts' to make a constitutional difference would open the gates to a stampede of tax avoidance." *Id.*

Since the "contractual tagging of the salesman" is without constitutional significance for a use tax, there is no reason for a different conclusion in the gross receipts context. TPI has never suggested why its own subjective decision to designate sales personnel as contractors rather than employees, without any difference in their functions, should mean different tax consequences. Obviously such an artificial distinction would lead to the same "stampede of tax avoidance" regardless of the type of tax.[22]

B. The Selling Tax Is Fairly Related to the Services Provided by the State of Washington.

TPI also argues that the selling tax is not fairly related to services provided by Washington, under the fourth prong of the *Complete Auto* test. This allegedly is because TPI utilized those services to a smaller extent than did a local manufacturer selling in state and it maintained "most (or at least much)" of its "values" in Texas. TPI Br. 18-20.

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[22]The argument that such a distinction should make a difference in tax consequences was rejected in the gross receipts tax context by *Illinois Commercial Men's Association v. State Board of Equalization*, 34 Cal.3d 839, 671 P.2d 349, 196 Cal.Rptr. 198 (1983), *appeal dism'd*, 466 U.S. 933 (1984). Expressly following *Scripto*, the California Court held that "the circumstance that investigation and/or settlement services" on the taxpayers' behalf "were performed by independent contractors is of little constitutional significance. The undeniable fact is that they were acting as agents" of the taxpayers. 671 P.2d at 355.

This argument is directly refuted by the only case TPI cites in this regard, *Commonwealth Edison*, 453 U.S. 609 (1981). There the taxpayers' complaint was that "the *amount* the State receives in [severance] taxes far exceeds the *value* of the services provided to the coal mining industry." 453 U.S. at 621 (emphases by the Court). The Court responded that

> there is no requirement under the Due Process Clause that the amount of general revenue taxes collected from a particular activity must be reasonably related to the value of the services provided to the activity. Instead, our consistent rule has been:
>
> * * *
>
> "A tax is not an assessment of benefits. It is, as we have said, a means of distributing the burden of the cost of government. The only benefit to which the taxpayer is constitutionally entitled is that derived from his enjoyment of the privileges of living in an organized society, established and safeguarded by the devotion of taxes to public purposes. * * *"

453 U.S. at 622-23. According to the Court, this latitude afforded the states under the Due Process Clause is not "somehow divested by the Commerce Clause". 453 U.S. at 623.

The Court went on to state this test:

> The relevant inquiry under the fourth prong of the *Complete Auto Transit* test is not * * * the *amount* of the tax or the *value* of the benefits allegedly bestowed as measured by the costs the State incurs on account of the taxpayer's activities. Rather, the test is closely connected to the first prong of the *Complete Auto Transit* test. Under this threshold test, the interstate business must have a substantial nexus with the State before *any* tax may be levied on it. * * * Beyond that threshold requirement, the fourth prong of the *Complete Auto Transit* test imposes the additional limitation that the *measure* of the tax must be reasonably related to the extent of the contact * * * *

453 U.S. at 625-26 (footnotes and citation omitted; emphases by the Court). There, this test was met. "Because it is measured as a percentage of the value of the coal taken, the Montana tax is in 'proper proportion' to [taxpayers'] activities within the State". 453 U.S. at 626.

Washington's tax also manifestly passes this test. As shown above, TPI's business has a substantial nexus with Washington. The measure of the tax is related exactly to the extent of TPI's Washington contact, being a percentage of TPI's gross receipts from Washington sales. *See Standard Pressed Steel*, 419 U.S. 560, 562, 564.

V. IF WASHINGTON'S TAX SYSTEM WERE TO BE INVALIDATED UNDER THE COMMERCE CLAUSE, THE ISSUE OF REMEDY REMAINS.

The decisions reached by the court below upholding Washington's multiple activities exemption are consistent with this Court's opinion in *Armco*, 467 U.S. 638 (1984), which is itself consonant with the Court's earlier decisions. However, the magnitude of tax refund claims requires the State to address remedies in the event that this Court might invalidate Washington's B&O tax, either as to out-of-state manufacturers or Washington manufacturers selling outside the state.[23]

A decision invalidating the tax would narrow the latitude the Constitution affords states fashioning their tax systems and would represent a significant departure from the Court's earlier Commerce Clause decisions. Were such a decision rendered, it should be applied prospectively, because it would expressly or by clear implication overrule "clear past precedent" on which the state has relied for the imposition of the tax. *Chevron Oil Co. v. Huson*, 404 U.S. 97, 106-07 (1971).

A. Any Decision Adverse to the State Should Be Given Prospective Effect.

A decision overturning Washington's manufacturing tax would rest either on a holding that manufacturing and selling taxes can *never* be deemed compensating taxes or on some other constitutional basis foreshadowed no earlier than the Court's opinion in *Armco*, 467 U.S. 638 (1984). A holding on the former grounds would represent a rejection of the Court's longstanding decision in *Hinson*, 8 Wall. 148 (1869) to which no reference was made in *Armco*. A decision invalidating Washington's manufacturing tax on any of the other grounds

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[23]As NCC has pointed out, NCC J.S. 4, potential tax refunds just for the period through December 31, 1984 approximate $423 million.

advanced here by The Taxpayers would not have been clearly signaled by any of the Court's opinions preceding *Armco*.[24]

The tests in *Chevron Oil* for prospective or retrospective application of decisions require the Court to determine whether retrospective application of a rule announced by the decision will promote or interfere with the constitutional interests bound up in the holding. In this regard, the Court has inquired whether retroactive application of its decision would, in actuality, advance the constitutional interests involved. *See, e.g., Lemon v. Kurtzman*, 411 U.S. 192 (1973) (*Lemon II*).

A decision adverse to the state in this case might prohibit the state from imposing its present tax system or require a particular form of apportioned taxation. Either result would not of itself demonstrate that its retrospective application would advance these Commerce Clause interests beyond what the prospective prohibition of the earlier system of taxation can accomplish. A contention that refunds for prior years will further the Commerce Clause's interest in preserving free trade in the future is too speculative. *Cf. Johnson v. New Jersey*, 384 U.S. 719, 728-29 (1966). Moreover, the Court should not require such a refund where The Taxpayers have failed to demonstrate loss from the kind of multiple taxation the Court has heretofore prohibited.

Finally, under the tests laid down in *Chevron Oil* the Court looks at the likelihood of substantial, inequitable results or hardship that may flow from a decision operating retroactively. While the Court may assess the conflicting interests of the parties, significant weight is accorded the good faith reliance of state and local governments on established law, where fiscal matters are involved and there is a need to prevent disruption in the public sector with respect to transactions already concluded. *See, e.g., Cipriano v. Houma*, 395 U.S. 701 (1969).

Washington's selling tax has been continually sustained

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[24]Consistent with the implications in their brief, The Taxpayers have previously argued in this litigation that the Court's opinions in *Maryland v. Louisiana*, 451 U.S. 725 (1981) and *Container Corp. of America v. Franchise Tax Board*, 463 U.S. 159 (1983) have clearly imperiled Washington's taxes. Only after the Court's decision in *Armco* were this challenge and those of other taxpayers mounted, a fact which sufficiently belies the contention.

by this Court.[25] There has been reliance upon the state's manufacturing tax both by public officials and, objectively speaking, by taxpayers themselves, following decisions upholding its validity by Washington's highest court, decisions from which no further appeal was taken or heard.[26]

Hardships that would be entailed by requiring refunds of revenues collected and expended as part of the state's enacted budgets over a period of more than six years are a matter of record.[27] As these potential dislocations are weighed, it must be noted once again that The Taxpayers have failed to demonstrate in the record any particularized injury resulting from an aggregation of those types of taxes which the Court has recognized as creating a burden of multiple taxation.

If any decision invalidating Washington's tax is entered, it should, therefore, have only prospective application.

B. This Court's Decisions Prompt Remand to the Court Below for Consideration of Further Issues of Remedy, if the Court Determines Retrospective Effect Is to Be Given to Its Decision.

If this Court were to decide that some retrospective application of a decision adverse to the state would be warranted, the nature of the remedy to be afforded requires resolution of questions which are not before the Court on this appeal. The Taxpayers would not unqualifiedly be entitled to refund sim-

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[25] *Standard Pressed Steel*, 419 U.S. 560 (1970); *General Motors*, 377 U.S. 436 (1964). *See also* the dismissal of an appeal challenging the tax, *Chicago Bridge & Iron*, 464 U.S. 1013 (1983).

[26] *See Crown Zellerbach*, 45 Wn.2d 749, 278 P.2d 305 (1954). *See also Crown Zellerbach Corp. v. State*, 53 Wn.2d 813, 328 P.2d 884 (1958), *appeal dism'd*, 359 U.S. 531 (1959). As the Court acknowledged in *Armco*, a case raising an issue similar to that presented here by Washington's manufacturing tax exemption was dismissed in 1982 for want of a substantial federal question. *Columbia Gas Transmission Corp. v. Rose*, 459 U.S. 807 (1982).

[27] *See* Affidavit of Daniel Keller, J.A. 210, 215. Based on projections for the state's current 1985-87 biennium, refunds of this magnitude would require an 18% reduction in all programs financed through the state's general fund.

ply by reason of a decision invalidating part or all of the tax in issue here.

In its first session following the Court's decision in *Armco*, 467 U.S. 638 (1984), the Washington legislature enacted a manufacturing business and occupation tax credit for Washington businesses paying gross receipts taxes to other jurisdictions.[28]

The credit, made provisional upon any decision invalidating Washington's tax, was adopted in the uncertain environment immediately following *Armco* in a straightforward effort by the state to anticipate possible ramifications to Washington's tax system of the Court's discussion of internal consistency. Issues of the credit's application, including any contentions about the validity of the credit itself and The Taxpayers' entitlement to the benefit, are not before this Court and remain to be resolved.

Washington law also contains a comprehensive severability provision as part of its revenue laws.[29] This statute would become relevant, should the 1985 credit provision for any reason be found infirm.

The issues arising out of these related features in Washington law were not reached by the court below. They demonstrate the "intertwined" questions of federal constitutional and state law that have prompted the remand of this Court's decisions for subsequent determinations about the application of exemptions or extensions of taxes. *Bacchus*, 468 U.S. 263, 277 (1984); *Hooper v. Bernalillo County Assessor*, 472 U.S. ___, 105 S.Ct. 2862, 2869 (1985). In these situations the courts below have been left with the determination whether an exemption is to be extended or a tax applied.

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[28]Wash. Rev. Code § 82.04.440, 1985 Wash. Laws ch. 190, § 1. The amended section is reproduced in the Appendix.

[29]Wash. Rev. Code § 82.98.030 is strikingly similar to that found in the savings clause in New York law which occasioned the Court to remand its opinion in *Boston Stock Exchange*, 429 U.S. 318, 337 n. 15 (1977) to the lower court for determination of its application. The text of this section is set out in the Appendix.

CONCLUSION

The judgment of the Washington Supreme Court should be affirmed. However, if the Court overrules some of its prior decisions and invalidates Washington's tax system, the Court should apply its decision prospectively. To the extent the decision is given retrospective application, the case should be remanded for the resolution of questions relating to The Taxpayers' remedy, not before the Court on this appeal.

DATED this 26th day of December, 1986.

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Appendix

Wash. Rev. Code § 82.04.440 Persons taxable on multiple activities. (1) Except as provided in subsections (2) and (3) of this section, every person engaged in activities which are within the purview of the provisions of two or more of sections RCW 82.04.230 to 82.04.290, inclusive, shall be taxable under each paragraph applicable to the activities engaged in.

(2) Persons taxable under RCW 82.04.250 or 82.04.270 shall not be taxable under RCW 82.04.230, 82.04.240, or subsection (2), (3), (4), (5), or (7) of RCW 82.04.260 with respect to extracting or manufacturing of the products so sold.

(3) Persons taxable under RCW 82.04.240 or 82.04.260 subsection (4) shall not be taxable under RCW 82.04.230 with respect to extracting the ingredients of the products so manufactured.

(4)(a) If it is determined by a court of competent jurisdiction, in a judgment not subject to review, that subsection (2) of this section results in an unconstitutional discrimination against interstate or foreign commerce, and that relief is appropriate for any tax reporting periods either before or after April 30, 1985, it is the intent of the legislature that the credit provided in (b) of this subsection shall be applied to such reporting periods and that relief for such periods be limited to the granting of such credit. It is further the intent of the legislature that such credit shall be applicable only under the conditions and to the extent provided in this subsection (4).

(b) As provided in (a) of this subsection, a person taxable under RCW 82.04.230, 82.04.240, or subsection (2), (3), (4), (5), or (7) of RCW 82.04.260 with respect to extracting or manufacturing products in this state shall be allowed a credit against those taxes for any gross receipts taxes paid to another state with respect to the sales of the products so extracted or manufactured in this state. The amount of the credit shall not exceed the tax liability arising under this chapter with respect to the extraction or manufacturing of those products.

(c) For the purpose of this subsection, "gross receipts tax" means a tax:

(i) Which is imposed on or measured by the gross volume of business, in terms of gross receipts or in other terms, and in

the determination of which the deductions allowed would not constitute the tax an income tax or value added tax; and

(ii) Which is also not, pursuant to law or custom, separately stated from the sales price.

(d) For the purpose of this subsection, "state" means state of the United States, any political subdivision thereof, or the District of Columbia, and any foreign country or political subdivision thereof. [As amended by 1985 Wash. Laws ch. 190, § 1.]

Wash. Rev. Code § 82.98.030 Invalidity of part of title not to affect remainder. If any chapter, section, subdivision of a section, paragraph, sentence, clause or word of [Title 82 RCW] for any reason shall be adjudged invalid, such judgment shall not affect, impair or invalidate the remainder of this title but shall be confined in its operation to the chapter, section, subdivision of a section, paragraph, sentence, clause or word of the title directly involved in the controversy in which such judgment shall have been rendered. If any tax imposed under this title shall be adjudged invalid as to any person, corporation, association or class of persons, corporations or associations included within the scope of the general language of this title such invalidity shall not affect the liability of any person, corporation, association or class or persons, corporations, or associations as to which such tax has not been adjudged invalid. It is hereby expressly declared that had any chapter, section, subdivision of a section, paragraph, sentence, clause, word or any person, corporation, association or class of persons, corporations or associations as to which this title is declared invalid been eliminated from the title at the time the same was considered the title would have nevertheless been enacted with such portions eliminated. This section shall not apply to chapter 82.44 RCW.

Supreme Court, U.S.
FILED
FEB 7 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-2006

In the Supreme Court of the United States

OCTOBER TERM, 1986

NATIONAL CAN CORPORATION, *et al.*,

Appellants,

v.

STATE OF WASHINGTON, DEPARTMENT OF REVENUE,

Appellee.

On Appeal from the Supreme Court of Washington

APPELLANTS' REPLY BRIEF

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NATION L CAN CORPORATION, *et al.*,

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APPELLANTS' REPLY BRIEF

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1. **Washington's Taxes Favor Local Business.** The State, acknowledging that it "may not provide a direct

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[1]Pursuant to Rule 28.1, Appellants state that the only changes to their original Designation of Corporate Relationships, App. G to J.S., as amended by footnote 1 to the Brief in Opposition to Motion to Dismiss or Affirm and the Appendix to the Brief for Appellants are: The British Columbia Sugar Refining Company, Ltd., is now a parent, and Chatteron, Inc., is now an affiliate, of Appellant Kalama Chemical, Inc.

commercial advantage to local business,"[2] theorizes that the prohibition is rigidly confined to just two mechanisms: those that either (a) "erect barriers," or (b) "allow an interstate business, already subject to a state's taxes, to *reduce* its tax burden in the state by *increasing* its business operations there." Appellee's Br. 15 (emphasis in original). The State errs in assuming that every other kind of direct commercial advantage somehow fosters "tax neutral decision-making." *Id.* But even if the prohibited "direct commercial advantage to local business" were as narrowly confined as the State theorizes (which we dispute *infra*), Washington's taxes provide just that kind of impermissible advantage.

a. **Reducing Washington Tax by Increasing In-State Business.** Companies can reduce their Washington taxes by increasing their in-state business activities as the following examples illustrate:

Example: Company X manufactures $50 million of paperboard in Washington, ships it to Oregon, and there converts it into boxes, adding $20 million of value. X then sells the finished product to Washington customers for $70 million. X's Washington tax liability is approximately $572,000—*i.e.*, $242,000 of manufacturing tax (0.484%[3] x $50 million manufacturing activity) plus $330,000 of whole-

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[2]Appellee's Br. 15, *quoting Boston Stock Exchange v. State Tax Commissioner*, 429 U.S. 318, 329 (1977).

[3]Wash. Rev. Code §§ 82.04.240 & 82.04.2904. (The Washington statutes cited herein are reproduced in Appendix E of National Can's Jurisdictional Statement.)

saling tax (0.484%[4] x $70 million in-state selling activity). X is also subject to an apportioned Oregon tax (on its conversion of paperboard boxes in Oregon). If X shifted its Oregon manufacturing activities to Washington, all of its manufacturing activities would become exempt from Washington tax.[5] By *increasing* its Washington activity, therefore, X would *decrease* its Washington taxes from $572,000 to $330,000 (as well as eliminating the tax paid to Oregon). *See Fibreboard Paper Products Corp. v. State,* 66 Wash. 2d 87, 401 P.2d 623 (1965).

Example: Company Y manufactures $30 million of products in Washington that it retails in other states. It pays approximately $145,200 in Washington manufacturing taxes (0.484% x $30 million of products). If Y doubled its Washington activity to $60 million by shifting all of its $30 million of retailing activity from other states into Washington (to combine with its $30 million of manufacturing activity), it would become exempt from Washington manufacturing tax.[6] It would pay approximately $141,300 tax on retailing its $30 million of products in Washington (retailing tax rate of 0.471%[7] x $30 million tax base). By *increasing* its Washington activity, Y would *reduce* its Washington tax burden (as well as eliminate taxes paid to other states on the selling activities performed there).

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[4]Wash. Rev. Code §§ 82.04.270 & 82.04.2904.

[5]Wash. Rev. Code § 82.04.440.

[6]*Id.*

[7]Wash. Rev. Code §§ 82.04.250, 82.04.2901 & 82.02.030.

Example: Company Z wholesales $50 million of products in Washington that it manufactures in other states. It has a Washington tax burden of $242,000 (0.484% wholesaling rate x $50 million of products sold in Washington). If Z shifted $40 million worth of its manufacturing activity to Washington and wholesaled the same $40 million worth of product there, it could increase its business activity in Washington from $50 to $80 million, while *reducing* its tax burden from $242,000 to approximately $194,000 (0.484% wholesaling tax rate x $40 million of selling activity, with the $40 million of manufacturing activity shifted into Washington enjoying an exemption or *zero* tax rate).

Each of these examples illustrates that by *increasing* business activities in Washington—*i.e.*, reducing interstate commerce—taxpayers can *reduce* their Washington tax burden. Washington's taxes thus discriminate even under the State's definition.

b. **State's Narrow Theory of Discrimination Is Wrong.** The State is wrong in theorizing that only two specific kinds of commercial advantage discriminate against interstate commerce. The State relies upon *Westinghouse Electric Corp. v. Tully*, 466 U.S. 388 (1984). *See* Appellee's Br. 16. There, the Court invalidated New York's tax incentive aimed at encouraging more exporting from New York. Washington asserts that "the Court struck down the credit only because it *reduced* the business' New York tax burden, *e.g.*, from $420 to $406, if the business *increased* its percentage of shipping out of New York from zero to one hundred percent. 466 U.S. at 400 n.9 (Table A)." Appellee's Br. 16 (emphasis in original)

Curiously, the State ignored the Court's *explicit negation of that assertion* by failing to note the entirety of the Court's analysis. The Table A example relied on by the State considered only the effect that a shift in export activity had on the DISC credit. That limited picture gave the State the mistaken impression that increasing in-state activity would reduce the New York tax burden. As the Court proceeded to demonstrate in Table B, however, the New York tax burden actually *increased* with greater export activity in that state (when apportionment, as well as the credit, was considered). The Court expressly recognized that, as a result of shifting business activity into New York, "the increased tax liability will more than offset the increased credit, so that the parent's *tax liability* to the State of New York, in absolute terms, *increases.*" *Id.* at 401 n.9 (emphasis supplied).[8] The Court has thus rejected—both by explicit statement and by example—the State's theory that a direct commercial advantage for local business is only objectionable if *increasing* local business *decreases* the tax burden.

2. **State's Concession Reveals Discrimination.** The State has conceded that "*if* the manufacturing tax stood alone it would be discriminatory because it applies primarily to interstate commerce." Appellee's Br. 22. The concession was unavoidable, because Washington's tax on manufacture is imposed only when the goods are *not* sold within the State. As a consequence, the State has been

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[8]As Table B shows, a taxpayer moving all of its export activity into New York to take maximum advantage of the credit would pay a New York tax of $435—obviously a higher burden than the $400 tax absent such a shift.

forced to claim that the tax on manufacture can be saved as a "compensating tax" to the tax on selling—if "the two taxes are considered together." *Id.* at 22-23. That claim depends on assumptions that are plainly wrong.

a. **Equal Burden Assumption Wrong.** The State asserts "Washington's manufacturing tax meets the compensating tax criteria" because the selling and manufacturing taxes "are designed to tax equally all goods sold or manufactured in Washington." *Id.* at 28. We are told that "the end result of these statutes is that all products sold or manufactured in Washington are subject to one B&O tax, either selling or manufacturing." *Id.* at 3-4. This one-tax-per-product premise is demonstrably wrong:

(i) *Three tax burdens vs. one.* Washington's tax generally operates as a pyramiding tax. For example: Extractor A sells its extracted product to Manufacturer B, who manufactures and sells it to Retailer C, who sells to the consumer, all within Washington. *Each* of the three businesses is taxed, so the product is burdened with *three* B&O taxes.[9] By contrast, if a single business performed all three activities within the state, there would be only one tax burden on the product (imposed on the retailing activity).[10]

(ii) *Two taxes on interstate commerce vs. one on local business.* Company X extracts a product in Washington, manufactures the product in Oregon, and returns

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[9]See Wash. Rev. Code §§ 82.04.230, 82.04.240, 82.04.250 & 82.04.440.

[10]Wash. Rev. Code § 82.04.440.

it for sale in Washington. X pays two Washington taxes, a tax on its extraction activity and a tax on its selling activity.[11] The same two-tax result occurs where Company Y partially manufactures a product in Washington, completes the manufacture in Oregon, and returns the product for sale in Washington. Y pays two Washington taxes, one on its in-state manufacturing and one on its selling activities.[12] Competitors of X and Y, performing the same activities within Washington, would pay only one tax.

The premise of the State's compensatory argument—that it seeks "equality" via a one-tax-per-product scheme—is clearly wrong.

(iii) *Inequality of Rates.* The State's "equality" argument depends explicitly on its assertion that it taxes manufacturing and selling at "identical" rates. *See* Appellee's Br. 11, 28-29. That assertion is wrong. The rate for manufacturing is sometimes higher, sometimes lower, and sometimes equal to the rate for selling.[13]

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[11]See Wash. Rev. Code §§ 82.04.230, 82.04.270 & 82.04.440.

[12]See Wash. Rev. Code §§ 82.04.240, 82.04.270 & 82.04.440; *see also Fibreboard Paper Products Corp. v. State*, 66 Wash. 2d 87, 401 P.2d 623 (1965).

[13]A few examples will suffice to illustrate the error of the State's "identical rate" characterization:

(a) The rate for manufacturing wheat (.330%) is many times *higher* than the rate on wholesaling wheat (.011%). *See* Wash. Rev. Code §§ 82.04.260(2), (1) & 82.04.2904.

(Continued on following page)

b. **Unlike Consumption Taxes, Taxes Here Not on Equivalent Events.** Even if Washington burdened manufacturing and selling equally, its taxes are not "compensatory" because manufacturing and selling are not substantially equivalent events. *Armco, Inc. v. Hardesty*, 467 U.S. 638 (1984).[14] The State's attempt to avoid the *Armco* holding is grounded on a confusion of its business and occupa-

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(Continued from previous page)

(b) The rate for manufacturing seafood (.138%) is much *lower* than the rate on wholesaling seafood (.484%). *See* Wash. Rev. Code §§ 82.04.260(4), 82.04.270(1) & 82.04.2904.

(c) Most other manufacturing is taxed at a rate (.484%) *higher* than that on retailing the same products (.471%). *See* Wash. Rev. Code §§ 82.04.240, 82.04.2904, 82.04.250, 82.04.2901 & 82.02.030. (Before 1983, the rates imposed under Wash. Rev. Code §§ 82.04.240 and 82.04.250 were equal.)

For many types of goods, Washington taxes manufacturing and wholesaling at the same rates. However, this leaves the Court with the same problem it identified in *Armco, Inc. v. Hardesty*, 467 U.S. 638 (1984), when West Virginia claimed that *its* manufacturing and wholesaling taxes were "compensating": one cannot tell what portion (if any) of Washington's wholesaling tax is attributable to manufacturing and what portion to selling. *Id.* at 643. Nor can Washington's taxes be justified (when rates are equal) by the economic analysis of the *Armco* dissent, based on the *differential* between the .88% tax on local business and the .27% tax on interstate commerce. *Id.* at 647.

[14]*See also Walling v. Michigan*, 116 U.S. 446 (1886) (taxes imposed solely on interstate sellers of liquor struck down as discriminatory, despite similar tax on in-state manufacturers of liquor), *cited with approval, Bacchus Imports, Ltd. v. Dias*, 468 U.S. 293, 271 (1984). *See also* W. Hellerstein, Complementary Taxes as a Defense to Unconstitutional State Tax Discrimination, 39 Tax Lawyer 405, 450 (1986) (concurring in *Armco's* conclusion that taxes on manufacturing and selling are not complementary, based on a different analysis).

tion taxes with local consumption taxes.[15] Appellee's Br. 25-28. The Court has allowed the state of consumption to tax interstate sales to local consumers by means of the sales or use tax.[16] Sales and use taxes, both being imposed on consumption, are recognized as "compensating taxes" applied to "substantially equivalent events." *Maryland v. Louisiana*, 451 U.S. 725, 758-59 (1981). Sales and use taxes are intended to assure a uniform tax burden on goods consumed in the taxing state. *Id.* at 759. The State has erroneously portrayed its taxes on manufacturing and selling as having the same result as consumption taxes—imposing *one*

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[15]As an *amicus* in *Armco*, Washington made the same compensatory argument, based on the same authority, it does here. The State persists in citing *Hinson v. Lott*, 75 U.S. (8 Wall.) 148 (1869), as if it involved taxes on manufacturing and selling (*see* Appellee's Br. at 27)—a mistaken impression the State admitted it could not reconcile with the Court's later decision in *Walling v. Michigan*, note 14 *supra*. *See* Brief of the State of Washington as *Amicus Curiae*, *Armco*, at 6-7. Whereas *Walling*, *Armco* and the present appeal involve taxes on manufacturing and on selling, *Hinson* involved a tax on a particular kind of property ("spirituous liquors") that was collected from either the importer or distiller. 75 U.S. at 152-53. The tax upheld in *Hinson* "was only the complementary provision necessary to make the tax equal on all liquor sold in the state." *Id.* at 153; *see* also 1865 Ala. Acts §§ 11-15.

[16]Special Subcomm. on State Taxation of the House Comm. on the Judiciary, *State Taxation of Interstate Commerce*, H.R. Rep. No. 565, 89th Cong., 1st Sess. at 1037-47 (1965) (and cases cited therein).

tax burden on the product.[17] The fallacy of the State's characterization has already been demonstrated.[18]

Moreover, the State's attempted analogy to consumption taxes refers to taxes imposed on *local* consumers—for whom Washington could assert a sovereign interest in equalizing tax burdens. In contrast, Washington's tax on manufacturing generally falls on *consumers in other states.* The State admits that it "applies primarily to interstate commerce"[19]—*i.e.,* to manufacturers who sell across state lines instead of locally. Therefore, Washington's defense of the manufacturing tax as compensatory to its tax on *local* selling—allegedly because the two taxes "are designed to tax equally all goods sold or manufactured in Washington"[20]—is an attempt to equalize burdens on *local* consumers with burdens on *consumers in other states.*

This Court has rejected that kind of "equalizing." *See Maryland v. Louisiana, supra.* Like Washington's manufacturing tax, the Louisiana First-Use Tax was designed to fall primarily on consumers in other states. 451 U.S. at

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[17]Appellee's Br. 3-4, 19-20. The error of the State's portrayal is explained in J. Hellerstein & W. Hellerstein, State & Local Taxation 301-03 (4th ed. 1978).

[18]*See* paragraph 2a *supra. See* also Wash. Rev. Code § 82.04.500 ("It is not the intention of this chapter that the taxes herein levied upon persons engaging in business be construed as taxes upon the purchasers or customers"); Wash. Rev. Code § 82.04.220 (B&O taxes are "for the act or privilege of engaging in business activities"); and *Fibreboard Paper Products Corp. v. State,* 66 Wash. 2d 87, 90, 401 P.2d 623, 625 (1965) (it "is the activity of manufacturing, not the product, which gets taxed").

[19]Appellee's Br. 22.

[20]*Id.* at 22, 28-29.

758-59. It was defended as compensatory to Louisiana's tax on severance of gas from within the state. While acknowledging that the First-Use Tax "does equalize the tax burdens on OCS gas leaving the State and Louisiana gas going into the interstate market," the Court held that "this sort of equalization is not the kind of 'compensating' effect that our cases have recognized." *Id.* at 759. Just as Louisiana had no legitimate interest in equalizing burdens borne by consumers in other states, neither does Washington. The Court explained:

> The two events are not comparable in the same fashion as a use tax complements a sales tax. In that case, a State is attempting to impose a tax on a substantially equivalent event to assure uniform treatment of goods and materials to be *consumed in the State.*

451 U.S. at 759 (emphasis supplied), followed in *Armco*, 467 U.S. at 643, holding explicitly that manufacturing and selling taxes are not imposed on substantially equivalent events. The force of that holding is equally applicable here.

3. **Considering Manufacturing and Selling Taxes Together Requires Internal Consistency.** The State's admission that its manufacturing tax discriminates unless "considered together" with the selling tax (Appellee's Br. 22-23) demonstrates the very discrimination the State denies. Considering the two taxes (on manufacturing and selling) together was precisely what this Court did in *Armco*. Observing that "when the two taxes are considered together, discrimination against interstate commerce persists," this Court explained that if other states imposed a like tax—which they have every right to do—interstate commerce will pay both a manufacturing and wholesaling tax, while local business will pay only one tax. 467 U.S. at 644. (The *Armco* opinion subsequently termed that analysis a require-

ment of "internal consistency." *Id.*) The State, finding it necessary to ask that the taxation of manufacturing and selling be "considered together," thus brings into play the internal consistency requirement,[21] which it admits that its taxes cannot meet. Brief of State of Washington as Amicus Curiae at 18, *Armco, supra; see also* State's Executive Briefing Chart, App. K to J.S. (devised by the State to depict its *Armco* problem); and Appellee's Br. 31-32.

The State's brief invites this Court's attention to its 1985 amendment of the tax scheme, which the State says was adopted to deal with its internal consistency problem. *See* Appellee's Br. 46-47. The amendment was not addressed by the court below because it found the tax constitutional without aid of corrective legislation. App. to J.S. at A-1. This Court might consider the amendment ripe for consideration because—according to the State—it bears on the internal consistency of the tax and applies retroactively to the tax years in issue here. *See* Wash. Rev. Code § 82.04.440, as amended in 1985; Appellee's Br. App. A-1.

The device employed by the amendment is an ostensible credit against Washington's manufacturing tax for selling taxes paid on the same goods to other states—*restricted,*

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[21]The State's dependence also refutes its claim that *Armco's* internal consistency analysis was mere *dicta*. Appellee's Br. 30. According to the State's "compensating tax" argument, the Court's consideration of the manufacturing and selling taxes together is *essential* to a correct analysis of the discrimination issue—and cannot, therefore, be merely *dicta*.

however, to situations where other states impose a gross receipts tax like Washington's.[22] According to *amici* National Governors' Association, *et al.* (Br. at 2), Washington is now the only state imposing such a tax. The "credit" is thus illusory. In any case, it fails to cure the discrimination inherent in Washington's statutes because it does not accord interstate commerce equal treatment with that given local business. Washington *guarantees* local business a *100% exemption* from the manufacturing tax if it performs its manufacturing and selling activities entirely within the state. By contrast, the "credit" for Washington manufacturers selling in interstate commerce is not guaranteed, but only a conditional possibility, and may well be less than 100% (if, indeed, there is any credit at all). Out-of-state manufacturers selling into Washington and paying Washington's tax on selling are not even offered a conditional credit to serve in lieu of the exemption granted to local business only. Besides failing to eliminate the facial discrimination of Washington's taxes, the amendment does nothing to correct their lack of fair apportionment.

The amendment also discriminates against interstate commerce on its face even if it were really possible to qualify for a credit. By its terms the credit is the exclu-

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[22]The legislature did not consider its business and occupation taxes similar enough to sales and use taxes to permit a credit when Washington's manufacturing tax is being imposed on goods that are subject to other states' sales or use taxes. This conclusion is directly contrary to the assertion that Washington's "gross receipts tax is a kind of sales tax." *See* Brief of the National Governors' Association, *et al.*, as *Amicus Curiae* in Support of Appellee at 2.

sive relief where a court has "determined . . . an unconstitutional discrimination against interstate or foreign commerce." Appellee's Br. App. A-1. Taxpayers entitled to to tax refunds on other grounds, including other state or federal constitutional grounds, are not affected. They continue to be covered by Washington's general statutes affording full refund of invalid or erroneous taxes. Wash. Rev. Code §§ 82.04.4286, 82.32.060 & 82.32.180. Under Washington's amended scheme, victims of discrimination against interstate commerce are treated as a disfavored, special class and denied the refund relief that is available to all other taxpayers. If legislatures practicing discrimination against interstate commerce could so easily retain the fruits of their discrimination, the Commerce Clause would indeed be ineffectual.

4. **Taxes "Considered Together" Contradicts State's Apportionment Contention**. The State has misunderstood National Can's apportionment argument. *See* Appellee's Br. 33. There is no claim that Washington taxes all National Can's income from all sources. Rather, the vice of the tax is that it reaches 100% of all gross receipts with which Washington has a nexus—even though those receipts were produced in part by activities performed in other states. *See* J.A. 175, ¶ 4; 179, ¶¶4-5; 180, ¶¶ 7-8.

The State, returning to a formalism from earlier days, asserts that "Selling and manufacturing are both *local* privileges. . . ." Appellee's Br. at 34 (emphasis supplied). Observing that states providing the market have been permitted to tax interstate sales to the exclusion of origin states, Washington concludes that it is the only state that can tax the "local" privilege of interstate sell-

ing. On the other hand, when Washington is the situs of the extracting or manufacturing part of the interstate business, Washington concludes that it is the only state that can tax these "local" activities as well. But when the taxes on both activities are considered together (as Washington insists in attempting to save them from discrimination), it is apparent that Washington is taxing *both* ends of the interstate business—contradicting the claim it makes at each end that only one state can tax the business.

Washington's tax at each end is measured by the *entire gross receipts* from the interstate activities—*i.e.*, the activities conducted in other states, as well as those in Washington. The State pretends that the business which manufactures in Washington and sells in other states has derived 100% of its receipts from the *manufacture alone*—while simultaneously pretending that the business which sells in Washington goods that it has manufactured in other states has derived 100% of its receipts from the *selling alone*. The problem of multiple taxation created by Washington's taxes cannot be meaningfully distinguished from the problem as to other privilege and income taxes where apportionment has been required.[23] If Washington can tax both ends of an interstate business, so can

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[23]Compare the present situation with the Court's explanation of the circumstances in which apportionment is required. *Hans Rees' Sons, Inc. v. North Carolina*, 283 U.S. 123, 132-35 (1931); *see also Gwin, White & Prince, Inc. v. Henneford*, 305 U.S. 434 (1939) (requiring apportionment in the context of Washington's business and occupation tax, there imposed on a fruit broker); and *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 275, 279 (1977) (confirming requirement of fair apportionment in context of business privilege tax measured by gross receipts).

any other state having comparable contacts. Where 100% of the income produced by both ends of the interstate activity is taxed by one state without apportionment, multiple taxation is inevitable.

5. **Actual Multiple Tax Burdens.** The resulting actual burden is confirmed by the stipulated record here. Washington imposes on National Can an unapportioned manufacturing tax, *i.e.*, a tax measured by 100% of National Can's receipts from sales in other states of products manufactured in Washington. Wash. Rev. Code § 82.04.240. Those other states also tax National Can's activity, but on an *apportioned* basis, measured by the same receipts. J.A. 181-82, ¶ 15.

Similarly, National Can pays Washington an unapportioned selling tax measured by 100% of National Can's receipts from products it manufactures in other states and sells in Washington. Wash. Rev. Code § 82.04.270(1). Those other states impose apportioned taxes on the same income. J.A. 182, ¶ 15.

Washington's unapportioned taxes therefore cause National Can to be subjected to an unconstitutional actual multiple tax burden.

6. **State's Prospective Application Request Premature.** Anticipating the possibility of an adverse decision, the State asks the Court either to limit its decision to

prospective application or to refrain from addressing the issue of remedy. *See* Appellee's Br. 44-48. The State's petitions are premature.[24] Moreover, to deny the recovery of taxes collected in violation of the Constitution would deny these Appellants its protection and undermine the purposes of the Commerce Clause.[25]

CONCLUSION

For the foregoing reasons and those set forth in Appellants' main brief, the decision below should be reversed.

Dated: February 6, 1987.

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[24]The State has confirmed prematurity by blocking consideration of sealed Exhibit 32, which must be unsealed and made available to counsel for argument when "prospective application" becomes ripe. *See* J.A. 172.

[25]Permitting states to retain the fruits of their discrimination would encourage them to adopt schemes shifting tax burdens from local to interstate commerce, and to resist correction as long as possible. The Court has held that "a denial by a state court of recovery of taxes enacted in violation of the laws or Constitution of the United States by compulsion is itself in contravention of the 14th Amendment." *Carpenter v. Shaw*, 280 U.S. 363, 369 (1930). *See also Ward v. Love County*, 253 U.S. 17, 24 (1920) ("to say that the county could collect these unlawful taxes by coercive means, and not incur any obligation to pay them back, is nothing short of saying that it could take . . . property . . . arbitrarily and without due process of law").

No. 85-2006

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

NATIONAL CAN CORPORATION, *et al.*,
Appellants,

v.

STATE OF WASHINGTON, DEPARTMENT OF REVENUE,
Appellee.

On Appeal from the Supreme Court of Washington

BRIEF OF AMICI CURIAE AMCORD, INC., *ET AL.* IN SUPPORT OF THE APPELLANTS

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STATEMENT OF INTEREST OF AMICI CURIAE

Amici are twenty-eight corporations [1] engaged in interstate commerce, including activities in the State of Washington that subject them to the Washington busi-

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[1] Amcord, Inc., Apple Computer, Inc., Brunswick Corporation, CPG Products Corporation, Darling Delaware Company, Inc., Del Monte Corporation, Delco Electronics Service Corporation, Ecko Products, Inc., Eddie Bauer, Inc., Encyclopedia Britannica, General Mills, Inc., General Mills Products Corporation, General Motors Corporation, Gifford-Hill Company, Inc., Glaco Corporation, Hewlett Packard Company, J.I. Case Company, Kellogg Sales Company, Life Savers, Inc., McNeilab, Inc., Monroe Auto Equipment Company, Nabisco, Inc., Ortho Pharmaceutical, Sandvik Special Metals Corporation, Tektronix, Inc., Triangle Pacific Corporation, U.S. Leasing Corporation, and York Manufacturing Company. This brief is filed with the consent of all parties.

ness and occupation tax at issue in this appeal. Amici are directly affected by the taxes involved here and have a direct interest in the resolution of this appeal. Like appellants, amici filed or anticipate filing actions in the Thurston County Superior Court for refunds of business and occupation taxes paid to appellee Department of Revenue, contending that the Washington tax scheme violates the Commerce Clause, U.S. Const. art. I, § 8. The present appeal involves fifty-three separate actions joined for decision by the Superior Court and consolidated for appeal to the Washington Supreme Court. As that latter court noted in its opinion upholding the Washington tax, "52 other substantially similar actions are pending in Thurston County Superior Court." App. to J.S. at A-1. Actions of amici are in addition to those actions, and the resolution of this appeal will have a direct effect on amici's refund actions.

In addition, quite apart from this particular appeal, amici have a strong interest in protecting interstate commerce from discriminatory and duplicative state taxation. Amici engage in extensive interstate commerce and are subject to a wide variety of taxes imposed by States and municipalities. This Court's disposition of the present appeal not only will affect amici directly, in light of their refund actions, but will impact on the future development of state and municipal taxation practices in a manner that will have long-term significance for interstate commerce.

SUMMARY OF ARGUMENT

To withstand Commerce Clause scrutiny, a state tax must not discriminate against interstate commerce and must be fairly apportioned. A tax that discriminates will be struck down even if fairly apportioned, and a tax that does not discriminate will nonetheless be struck down if not fairly apportioned. The Washington business and occupation tax violates the Commerce Clause

because it discriminates against interstate commerce—an issue dealt with in detail in appellants' brief. Quite apart from the evident discrimination, the tax is also invalid because it is not fairly apportioned.

Washington imposes an unapportioned tax on the full value of receipts from wholesaling or manufacturing activities in Washington. Activities by the taxpayers in other States, however, contribute to earning the receipts taxed in full by Washington. To take the clearest example from the facts of this case, if a company manufactures a product in California and sells it in Washington, the manufacturing activity in California contributes to the value of the receipts from sales in Washington. California is thus entitled to tax a portion of those receipts. Since Washington taxes the full value of the receipts, and California taxes a portion, interstate commerce is subjected to duplicative taxation in violation of the Commerce Clause. The fault is that of Washington, not the other States, because Washington does not apportion its tax.

ARGUMENT

This Court has articulated a four-part test to determine if state taxation of interstate commerce can be sustained against a Commerce Clause challenge. A tax will be upheld "when the tax is applied to an activity with a substantial nexus with the taxing State, is fairly apportioned, does not discriminate against interstate commerce, and is fairly related to the services provided by the State." *Complete Auto Transit, Inc.* v. *Brady*, 430 U.S. 274, 279 (1977). *See Exxon Corp.* v. *Wisconsin Department of Revenue*, 447 U.S. 207, 228 (1980); *Mobil Oil Corp.* v. *Commissioner of Taxes*, 445 U.S. 425, 443 (1980); *Japan Line, Ltd.* v. *County of Los Angeles*, 441 U.S. 434, 444-445 (1979). To withstand scrutiny under the Commerce Clause, a state tax must satisfy each of these four separate requirements. For the reasons set forth in appellants' brief on the merits, the Washington

business and occupation tax is invalid because it discriminates against interstate commerce.[2]

The Washington tax scheme, however, is also invalid because it is not fairly apportioned.[3] The lack of fair apportionment is an entirely independent basis for striking down the Washington tax. This Court need only reach the issue of fair apportionment if it concludes that the Washington tax scheme does not discriminate against interstate commerce—a conclusion that would require overruling *Armco*. Thus, even in the unlikely event that this Court determines that it erred in *Armco*, the tax at issue in this appeal must nonetheless fall.

The requirement that state taxes on interstate commerce be fairly apportioned is a necessary consequence of the commingling of a Federal system of government and unitary businesses whose activities cross state lines. If a business that engages in activities in several States were subject to taxation by each State on the full value of its interstate commerce, it would bear a burden of multiple taxation that a purely local business would be spared. The imposition of such a burden solely because the activities of the business cross state lines contravenes the Commerce Clause. While "interstate commerce must bear its fair share of the state tax burden," *Washington Revenue Dept.* v. *Association of Washington Stevedoring*

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[2] *See Armco Inc.* v. *Hardesty*, 467 U.S. 638 (1984). *See generally* Brief of Amici Curiae Amcord, Inc., *et al.* in Support of the Jurisdictional Statement, *National Can Corp.* v. *State of Washington*, No. 85-2006. The fact that the Washington tax discriminates against interstate commerce suffices to render it invalid under the Commerce Clause, regardless of whether the tax satisfies the other three components of the *Complete Auto* test. *See Westinghouse Electric Corp.* v. *Tully*, 466 U.S. 388 (1984) (fairly apportioned tax struck down as discriminatory).

[3] In their Jurisdictional Statement, appellants challenged the Washington tax on both discrimination and apportionment grounds. *See* J.S. at 7 n.3.

Cos., 435 U.S. 734, 750 (1978), it cannot be forced to bear more than its fair share through multiple taxation.

This Court reviewed the basis of the apportionment requirement in *Japan Line, Ltd.* v. *County of Los Angeles*, 441 U.S. at 446-447 (citations omitted):

> It is a commonplace of constitutional jurisprudence that multiple taxation may well be offensive to the Commerce Clause. In order to prevent multiple taxation of interstate commerce, this Court has required that taxes be apportioned among taxing jurisdictions, so that no instrumentality of commerce is subjected to more than one tax on its full value. The corollary of the apportionment principle, of course, is that no jurisdiction may tax the instrumentality in full.

The Washington business and occupation tax "is unapportioned," *General Motors Corp.* v. *Washington*, 377 U.S. 436, 448 (1964), and represents an effort by Washington to tax the full value of interstate commerce.[4]

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[4] The majority in *General Motors* held that the Washington tax did not violate the Due Process Clause, but refrained from passing on the Commerce Clause issues presently before this Court. 377 U.S. at 448-449. The majority's comments on apportionment concerned "whether the State is exacting a constitutionally fair demand for that aspect of interstate commerce to which it bears a special relation," *id.* at 440—concerns that are directed to the Due Process Clause or the fourth prong of the *Complete Auto* test, whether the tax "is fairly related to the services provided by the State." 430 U.S. at 279. *See Mobil Oil Corp.* v. *Commissioner of Taxes*, 445 U.S. at 441 (citing *General Motors* for "due process requirements for apportionability"). The majority expressly did not consider any claim of "multiple taxation," 377 U.S. at 448, the concern of the fair apportionment prong of the *Complete Auto* test. The four dissenters in *General Motors* did reach the Commerce Clause claim of multiple taxation, and would have held the tax at issue on this appeal invalid because it was not fairly apportioned. *See* 377 U.S. at 450-451 (Brennan, J., dissenting); *id.* at 458 (Goldberg, J., dissenting, joined by Stewart and White, JJ.).

Washington imposes its gross receipts tax on 100% of the receipts from sales in Washington or on 100% of the receipts from manufacturing in Washington. Other States, however, are free to impose taxes on a portion of those same receipts, as a result of activities in those States that contribute to the receipts. The record in this case demonstrates that other States in fact do so.[5]

For example, appellant National Can Corporation manufactures products in California and sells them in Washington. California imposes an income tax on National Can, based on National Can's gross receipts (including gross receipts from sales in Washington), less certain deductions, multiplied by an apportionment factor. *See* App. to J.S. at I-4. In short, receipts from sales in Washington are taken into account by California in taxing National Can. California is free to do this because the manufacturing activity of National Can *in California* contributes, in part, to realizing the receipts from sales in Washington. Since California apportions its tax, it does not take more than its fair share from sales in Washington, but it does take its fair share.

Washington, however, taxes 100% of the receipts from sales in Washington, with no apportionment. Since Washington taxes all of the receipts, and California taxes a portion, it is clear that National Can is subject to taxation on more than 100% of its receipts from Washington. This is because Washington violates the "corollary of the apportionment principle * * * that no jurisdiction

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[5] It was stipulated below that appellants subject to the Washington manufacturing tax pay taxes to other jurisdictions based on sales in those jurisdictions of products manufactured in Washington. *See* App. to J.S. at H-2 - H-3, I-3. It was also stipulated that appellants subject to the Washington wholesaling tax pay taxes to other jurisdictions based on the manufacture in those jurisdictions of products sold in Washington. *See id.* at I-4, J-3.

may tax the instrumentality in full." *Japan Line, Ltd.* v. *County of Los Angeles*, 441 U.S. at 447.

To take the converse example, appellant Kalama Chemical, Inc., manufactures products in Washington and sells them in Illinois. Illinois imposes an income tax on Kalama, based on Kalama's gross receipts from sales, less certain deductions, multiplied by an apportionment factor. *See* App. to J.S. at H-2. Washington, however, taxes 100% of the gross receipts Kalama realizes from manufacturing in Washington. When Kalama sells in Illinois a product manufactured in Washington, Washington taxes 100% of the receipts and Illinois taxes a portion of them. As with National Can, Kalama faces a burden of multiple taxation because Washington taxes the full value of commerce attributable to more than one State.[6]

The Washington Department of Revenue argues, however, that the tax is effectively apportioned by "allocation." As the court below described the State's argument, the tax is fairly apportioned because "the tax is applied only to the value of products manufactured in Washington or to the gross proceeds of sales in Washington." App. to J.S. at A-14. The foregoing examples, however, prove—on the basis of stipulated facts—that allocation does not effectively apportion the tax to avoid multiple taxation. And this Court's recent opinions dem-

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[6] The foregoing examples correspond to the actual facts stipulated by the parties. The danger of multiple taxation inherent in Washington's tax scheme is also vividly demonstrated by application of the "internal consistency" test. *See Armco Inc.* v. *Hardesty*, 467 U.S. at 644; *Container Corp. of America* v. *Franchise Tax Board*, 463 U.S. 159, 169 (1983). That test considers the effect on commerce if the subject tax were applied by every jurisdiction. In this case, applying the internal consistency test, the State in which a product is manufactured and the State in which it is sold would each tax 100% of the gross receipts realized from the manufacture and sale of that product, resulting in clear multiple taxation.

onstrate that allocation is not an acceptable means of apportioning a tax on interstate commerce.[7]

In *Mobil Oil Corp.* v. *Commissioner of Taxes*, 445 U.S. at 444, this Court recognized that "[t]axation by apportionment and taxation by allocation to a single situs are theoretically incommensurate * * * ." To permit taxation by allocation, the Court would be required as a matter of both law and logic to hold that other States could not include income allocated to a particular State in calculating their own income tax, no matter how carefully the tax was apportioned. Thus, California could not include income from National Can's sales in Washington in calculating National Can's income tax, even though California apportions the tax so as to reach only its fair share of income from Washington sales. Similarly, Illinois could not include income from sales *in Illinois* of Kalama's products manufactured in Washington in calculating Kalama's income tax, because the receipts from those sales would be allocated to Washington, which taxes the manufacture of the products.

This Court's opinions not only recognize the incompatibility of allocation and apportionment, *see id.*, but also express a clear preference for apportionment. In

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[7] The fact that Washington's tax is a gross receipts tax rather than an income tax has no significance for Commerce Clause purposes. *See, e.g., Moorman Mfg. Co.* v. *Bair*, 437 U.S. 267, 280-281 (1978); *id.* at 281 (Brennan, J., dissenting); *Armco Inc.* v. *Hardesty*, 467 U.S. at 644. This Court has not restricted its fair apportionment analysis to state income taxes. *See, e.g., J.D. Adams Mfg. Co.* v. *Storen*, 304 U.S. 307, 311 (1938) (gross receipts tax); *Gwin, White & Prince, Inc.* v. *Henneford*, 305 U.S. 434, 438-439 (1939) (gross receipts tax); *Japan Line, Ltd.* v. *County of Los Angeles*, 441 U.S. at 444-447 (property tax). Any failure to apply the fair apportionment requirement to gross receipts taxes, while applying it to income taxes, would of course be an open invitation to States desirous of taxing more than their fair share of interstate commerce to shift from an apportioned net income tax to an unapportioned gross receipts tax.

Mobil Oil, for example, the Court considered an apportioned Vermont income tax. Vermont sought to reach its apportioned share of dividend income received by the taxpayer, a New York corporation, from foreign affiliates and subsidiaries. The taxpayer argued that the dividends could not be included in the income subject to apportionment, but must be *allocated* to New York, under the traditional rule that dividends are fully taxable at the commercial domicile or business situs. *See id.* at 436, 443-444. The Court disagreed, and upheld the Vermont tax:

> [W]e may assume * * * that the State of commercial domicile has the authority to lay some tax on * * * dividend income * * * . But there is no reason in theory why that power should be exclusive when the dividends reflect income from a unitary business, part of which is conducted in other States. In that situation, the income bears relation to benefits and privileges conferred by several States. *These are the circumstances in which apportionment is ordinarily the accepted method.* [*Id.* at 445-446 (emphasis supplied).]

Here too when a unitary business gains receipts from sales in Washington, those receipts reflect value from activities in other States, including, for example, the State in which the product was manufactured. All of the receipts should therefore not be allocated to Washington for taxation. Rather, "[t]hese are the circumstances in which apportionment is ordinarily the accepted method." *Id.* at 446.

Similarly, in *Exxon Corp.* v. *Wisconsin Department of Revenue*, *supra*, Wisconsin sought to include in its apportioned income tax income from the taxpayer's oil exploration and production activities. Although the taxpayer sold its products in Wisconsin, it engaged in no exploration or production activities there. The taxpayer argued that its income from exploration and production

should not be subject to apportionment but must be allocated to the situs State. 447 U.S. at 227. This Court disagreed, holding that "[t]he geographic location of * * * raw materials does not alter the fact that [income from exploration and production] is part of the unitary business of the interstate enterprise and is subject to fair apportionment among all States to which there is a sufficient nexus with the interstate activities of the business." *Id.* at 230.

So too here the "geographic location" of manufacturing or of sales does not alter the fact that income from manufacturing or sales is part of the unitary business, and is subject to apportionment. Washington, however, seeks to allocate all of the receipts from manufacturing in Washington to itself, and all of the receipts from sales in Washington to itself, solely because one of these events —manufacturing or wholesaling—occurred in Washington. The teaching of *Mobil Oil* and *Exxon* is that when activities in other States contribute to the earning of the receipts, those States may tax their fair share by apportionment, and allocation is not appropriate.[8]

The danger of multiple taxation of interstate commerce is inherent in the Washington tax scheme. Apportionment by allocation to the State where a particular event occurred avoids multiple taxation only if every State that imposes a tax bases it on the same event. If every State taxed only wholesaling, and receipts were allocated to the State in which the wholesaling occurred, there would be no multiple taxation. Indeed, if Washington imposed only a wholesaling tax, it could credibly press its allocation argument and contend that any multiple taxation was no more its fault than the fault of

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[8] *See* Hellerstein, *State Income Taxation of Multijurisdictional Corporations: Reflections on* Mobil, Exxon *and H.R. 5076*, 79 Mich. L. Rev. 113, 152-153 (1980); *The Supreme Court, 1979 Term*, 94 Harv. L. Rev. 75, 122 (1980).

other States.[9] Washington, however, imposes its tax on interstate commerce on the basis of wholesaling or manufacturing—whichever occurs in Washington. Washington can hardly argue that the power to tax should be allocated to the wholesaling situs when it taxes manufacturing if the wholesaling occurs outside its borders. Washington's allocation "principle" thus amounts to nothing more than an assertion that the power to tax should be allocated to Washington.[10]

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[9] *See Armco Inc.* v. *Hardesty*, 467 U.S. at 645. In *Moorman Mfg. Co.* v. *Bair*, *supra*, the Court upheld an Iowa income tax that was apportioned by a single-factor sales formula. The Court emphasized, however, that the record before it "does not establish the essential factual predicate for a claim of duplicative taxation." *Id.* at 276. In a subsequent case the Court expressly rejected an argument based on *Moorman* when the record *did* demonstrate multiple taxation. *See Japan Line, Ltd.* v. *County of Los Angeles*, 441 U.S. at 455. Here the parties have stipulated that appellants are subject to taxes in other States based in part on receipts that are taxed in full by Washington, *see* App. to J.S. at H-2 - H-3, I-3 - I-4, J-3, and accordingly "the essential factual predicate for a claim of duplicative taxation" is clearly established. In addition, the tax at issue in *Moorman*—unlike the Washington tax scheme—satisfied the "internal consistency" test.

[10] The State relies upon the statement in *Standard Pressed Steel Co.* v. *Department of Revenue*, 419 U.S. 560, 564 (1975), that the Washington tax is "apportioned exactly to the activities taxed." Motion to Dismiss or Affirm at 23. What the Court said in full, however, was that the tax is " 'apportioned exactly to the activities taxed,' all of which are intrastate." 419 U.S. at 564 (quoting *Gwin, White & Prince, Inc.* v. *Henneford*, 305 U.S. at 440). Here it is stipulated that appellants' activities outside Washington contribute to the value of the receipts taxed in full by Washington. *See* App. to J.S. at H-1 - H-2, I-2, J-2. In any event, *Standard Pressed Steel* was primarily concerned with nexus rather than multiple taxation issues, and its comments concerning apportionment were not addressed to the question of multiple taxation. The Court did not pause long on that question, because the taxpayer did not make "any effort" to show that it faced multiple taxation. 419 U.S. at 563. As previously noted, the stipulations in this case establish multiple taxation as a fact.

The court below appeared to base its conclusion that the tax was fairly apportioned on the ground that "Washington does not tax the income of a unitary business, but rather taxes only the privilege of manufacturing or selling within the state." App. to J.S. at A-14. The court apparently viewed manufacturing and wholesaling as two separate businesses, and saw no problem with Washington taxing 100% of the receipts from whichever activity occurred in Washington. National Can, however, which is subject to the Washington wholesaling tax, is not simply in the business of selling. It manufactures the products it sells, and that manufacturing activity in California helps earn the receipts taxed in full by Washington. Similarly Kalama, which is subject to the Washington manufacturing tax, is not simply a manufacturer but also markets the products it manufactures, and its sales activity in Illinois helps earn the manufacturing receipts taxed in full by Washington.

This Court has long recognized that when "the corporate enterprise is a unitary one, in the sense that the ultimate gain is derived from the entire business," it is not appropriate for one State to tax the entire income "regardless of the extent to which it may be derived from the conduct of the enterprise in another State." *Hans Rees' Sons* v. *North Carolina*, 283 U.S. 123, 133 (1931). The parties have stipulated in this case that appellants engage in activities in other States that contribute to the value of products manufactured or sold in Washington. *See* App. to J.S. at H-1 - H-2, I-2, J-2. The most telling argument against the "separate business" view of the court below, however, is the Washington tax itself. That tax is imposed on manufacturing in Washington and wholesaling in Washington, but provides an exemption from the manufacturing tax for any business that pays the wholesaling tax. Wash. Rev. Code § 82.04.440. The State itself thus recognizes that

manufacturing and wholesaling are not separate businesses but parts of a single enterprise.[11]

Almost fifty years ago this Court struck down a state tax because it "includes in its measure, without apportionment, receipts derived from activities in interstate commerce." *J.D. Adams Mfg. Co.* v. *Storen*, 304 U.S. at 311. *See Gwin, White & Prince, Inc.* v. *Henneford*, 305 U.S. at 438-439. The Washington gross receipts tax includes in its measure all the receipts from manufacturing or wholesaling in Washington, even though those receipts are earned, in part, by the taxpayers' activities outside Washington. Since the States in which these activities occur may tax a portion of the receipts, Washington may not tax them all. "The corollary of the apportionment principle, of course, is that no jurisdiction may tax the instrumentality in full." *Japan Line, Ltd.* v. *County of Los Angeles*, 441 U.S. at 447. In attempting to do so, the Washington tax imposes multiple and duplicative taxation on interstate commerce.

The inevitable consequence of this duplicative taxation is that business will be encouraged to avoid interstate commerce and perform as many activities as possible in Washington. "It is only the interstate context of the company's business which causes it to pay a tax measured by gross receipts more than once in the chain of production and distribution." Special Subcomm. on State Taxation, *supra* at 1060. Washington's unapportioned tax is thus an effort "to tax an in-state operation as a means of 'requiring [other] business operations to be performed in the home State.'" *Boston Stock Ex-*

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[11] *See* Special Subcomm. on State Taxation of the House Comm. on the Judiciary, *State Taxation of Interstate Commerce*, H.R. Rep. No. 565, 89th Cong., 1st Sess. at 1059 (1965) ("if indeed a production tax and a selling tax are different taxes when applied to manufacturers, then in those States imposing them one would expect a manufacturer to be taxed twice, once under the production levy and again under the selling levy. Such is not the case").

change v. *State Tax Comm'n*, 429 U.S. 318, 336 (1977) (quoting *Pike* v. *Bruce Church, Inc.*, 397 U.S. 137, 145 (1970)). If Washington can use duplicative taxation to skew the competition with its neighbors for business, however, its neighbors can retaliate in kind. The end result would be "the multiplication of preferential trade areas destructive of the free commerce anticipated by the Constitution." *Maryland* v. *Louisiana*, 451 U.S. 725, 754 (1981). Washington cannot arrogate to itself the right to tax the full value of receipts earned in several States. Each State is entitled to tax no more than its fairly apportioned share.

CONCLUSION

For the foregoing reasons, and those in the Brief of Appellants, this Court should reverse the decision below.

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Supreme Court, U.S.
FILED
NOV 20 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-2006 and No. 85-1963

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

NATIONAL CAN CORPORATION, *et al.*,
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v.

STATE OF WASHINGTON, DEPARTMENT OF REVENUE,
Appellee.

TYLER PIPE INDUSTRIES, INC.,
Appellant,

v.

STATE OF WASHINGTON, DEPARTMENT OF REVENUE,
Appellee.

On Appeal from the
Supreme Court of the State of Washington

BRIEF OF THE COMMITTEE ON STATE TAXATION OF THE COUNCIL OF STATE CHAMBERS OF COMMERCE AS *AMICUS CURIAE* IN SUPPORT OF APPELLANTS

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QUESTION PRESENTED

Whether a state's gross receipts tax system which imposes a tax on manufacturing and on selling activities but exempts from taxation the manufacturing activities of purely local manufacturer-sellers impermissibly discriminates against interstate commerce in violation of the Commerce Clause of the United States Constitution?

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BRIEF OF THE COMMITTEE ON STATE TAXATION OF THE COUNCIL OF STATE CHAMBERS OF COMMERCE AS *AMICUS CURIAE* IN SUPPORT OF APPELLANTS

INTRODUCTORY STATEMENT

This brief is submitted by the Committee on State Taxation of the Council of State Chambers of Commerce as *amicus curiae* in support of the Appellants in the

above-captioned cases. Written consents of the Appellants and the Appellee have been obtained and are attached herewith.

INTEREST OF AMICUS CURIAE

The Council of State Chambers of Commerce (COUNCIL), organized in 1932, consists of 41 Chambers of Commerce. The Committee on State Taxation (COST), one of the three advisory committees of the COUNCIL, consists of 249 corporate members which conduct a substantial portion of the interstate commerce of United States taxpayers. One of COST's principal activities has been to work with the states and others toward developing fair and equitable standards of state taxation.

Member companies of COST are representative of that part of the Nation's business sector which is most directly affected by state taxation of interstate operations. COST is, therefore, vitally interested in cases such as this one which present issues significantly affecting state and local taxation of interstate commerce.

Member companies of COST conduct business in Washington, West Virginia and Indiana, and in many local taxing jurisdictions, such as Los Angeles and Philadelphia—all of which have gross receipts tax systems. This Court in *Armco, Inc. v. Hardesty*, 467 U.S. 638 (1984), made clear that, in determining the validity of a state's gross receipts tax under the Commerce Clause, the principle of "internal consistency" applies. Under this rule, a state tax must have an internal consistency such that, if the challenged tax were applied by every jurisdiction, there would be no impermissible interference with interstate commerce.

Washington's gross receipts tax at issue in this case is the mirror image of the West Virginia taxing system declared unconstitutional in the *Armco* case. Like West Virginia, Washington imposes a gross receipts tax on the

privilege of manufacturing within the state. Wash. Rev. Code § 82.04.240. Similarly, Washington also imposes a gross receipts tax on companies engaged in the business of selling at wholesale and at retail. Wash. Rev. Code §§ 82.04.270 & 82.04.250. The Washington "multiple activities" exemption is the reverse of that found in the West Virginia tax scheme, exempting wholly intrastate businesses from the manufacturing tax instead of the selling tax. Washington manufacturer-sellers, who are taxed as wholesalers or retailers, are exempt from taxation as manufacturers. Wash. Rev. Code § 82.04.440.

The discriminatory effect in this case is identical to that found by the Court in *Armco*. Both gross receipts tax systems lack internal consistency. If the precise tax scheme of each state were projected into other states, as was shown in *Armco*, interstate manufacturer-wholesalers would be subjected to two gross receipts taxes while wholly intrastate manufacturer-wholesalers are assured of being subjected to only one such tax. The West Virginia tax system invalidated in *Armco* and the Washington taxing scheme here at issue both discriminate against interstate commerce in favor of wholly local, intrastate commerce. If the Washington Supreme Court had applied the "internal consistency" test prescribed by the Court in *Armco*, it would have been equally clear that the Washington gross receipts tax scheme is also unconstitutionally discriminatory under the Commerce Clause. The Washington Supreme Court, however, held that the Washington tax does not discriminate against interstate commerce, choosing to disregard the Court's decision in *Armco* as controlling precedent and relying instead on earlier cases in which the state's gross receipts tax withstood various commerce clause challenges because it was "unable to find . . . a command in the *Armco* decision" to "disregard earlier decisions not overruled." 105 Wash. 2d at 332.

Appellant interstate businesses in the "test case" before this Court, *National Can Corporation, et al. v. State of Washington, Department of Revenue*, No. 85-2006, are representative of more than 100 taxpayers engaging in interstate commerce who filed substantially similar actions in reliance upon the Court's decision in *Armco*. The critical issue in all these cases is whether Washington's application of its Business and Occupation Tax, a gross receipts tax functionally indistinguishable from the West Virginia tax invalidated in *Armco* because it subjected interstate commerce to an unfair burden of multiple taxation not borne by local commerce, impermissibly discriminates against interstate commerce.

The decision of the Washington Supreme Court, in its disregard of the "internal consistency" test for establishing constitutionally impermissible multiple taxation burdens upon interstate commerce, is in irreconcilable conflict with this Court's decision in *Armco* and is inconsistent with prior rulings by this Court striking down discriminatory state taxes under the Commerce Clause. This case is indistinguishable from *Armco* and the conflicting decision below threatens to disrupt the current progress by the states toward assuring a reasonably consistent and fair system of taxation throughout the nation which will (1) allow each state to receive its just share of the total tax contribution of the nation's business sector, (2) prevent inequity and (3) protect the Constitutional rights of interstate corporate taxpayers.

SUMMARY OF ARGUMENT

A state's gross receipts tax scheme which subjects an interstate manufacturer-seller to multiple taxation not borne by a local wholly intrastate competitor constitutes an impermissible discrimination against interstate commerce in violation of the Commerce Clause of the United States Constitution.

ARGUMENT

THE WASHINGTON B&O TAX OPERATES DISCRIMINATORILY TO IMPOSE A BURDEN ON INTERSTATE COMMERCE NOT BORNE BY INTRASTATE COMMERCE

In *Armco, Inc. v. Hardesty*, 467 U.S. 638 (1984), this Court held that West Virginia's wholesale gross receipts tax, from which local manufacturers were exempt, unconstitutionally discriminated against interstate commerce notwithstanding that local manufacturers making sales in the state were subject to a much higher manufacturing gross receipts tax. The West Virginia tax was found to be facially discriminatory because two companies selling tangible property at wholesale in West Virginia would be treated differently depending on whether the taxpayer conducted manufacturing in the state or out of it. The discriminatory effect on interstate commerce in favor of wholly local intrastate commerce was further demonstrated when the state's precise tax system was projected into other states:

> "If Ohio or any of the other 48 States imposes a like tax on its manufacturers—which they have every right to do—then Armco and others from out of state will pay both a manufacturing tax and a wholesale tax while sellers resident in West Virginia will pay only the manufacturing tax." 467 U.S. at 644.

This Court in *Armco* specifically rejected the view that actual discrimination against interstate commerce must be shown and adopted the principle of "internal consistency" in determining the validity of a state's gross receipts tax under the Commerce Clause:

> "Appellee suggests that we should require Armco to prove actual discriminatory impact on it by pointing to a State that imposes a manufacturing tax that results in a total burden higher than that imposed on Armco's competitors in West Virginia. This is

> not the test. In *Container Corp. of America v. Franchise Tax Board*, 463 U.S. 159, —— (1983), the Court noted that a tax must have 'what might be called internal consistency—that is the [tax] must be such that, if applied by every jurisdiction,' there would be no impermissible interference with free trade. In that case, the Court was discussing the requirement that a tax be fairly apportioned to reflect the business conducted in the State. A similar rule applies where the allegation is that a tax on its face discriminates against interstate commerce." 467 U.S. at 644.

Any other rule, the Court noted, would mean that the constitutionality of the tax would depend on the "shifting complexities" or the "vagaries" of the tax laws of the other states having nexus to tax the activities in question. *Id.* at ——. *Mobil Oil Corp. v. Commissioner of Taxes*, 445 U.S. 425, 444 (1980); *Freeman v. Hewit*, 329 U.S. 249, 256 (1946).

As the stipulated facts in the record of the *National Can* case show, the gross receipts tax imposed by the State of Washington fails to meet the "internal consistency" test of *Armco*. If the Washington tax system were in effect in other jurisdictions, companies engaging in interstate commerce who manufacture in Washington but sell their products outside the state would be subject to both a manufacturing tax and a selling tax. The converse is also true. Out-of-state companies manufacturing goods in a state having the same taxation provisions as Washington would be subject to two taxes on interstate sales to Washington customers. The state of manufacture would exact a manufacturing tax measured by gross sales receipts and Washington would levy a tax on wholesale or retail sales to Washington residents.

This same burden of multiple taxation is not borne by wholly intrastate local competitors, both manufacturing and selling in Washington, since the Washington Business and Occupation Tax Law contains anti-double

taxation provisions by granting Washington manufacturer-sellers an exemption from the manufacturing tax. The Washington gross receipts tax scheme provides wholly local intrastate businesses a tax benefit, unavailable to taxpayer companies engaged in interstate commerce, of "two activities for the price of one" (105 Wash.2d at ——), as the court below acknowledged.

The discriminatory effect of the Washington gross receipts tax system in this case, identical to the burden on interstate commerce found unconstitutional under the "internal consistency" test of *Armco*, was acknowledged by the court below:

> "Any direct commercial advantage to local businesses inherent in Washington's B&O tax results from duplicative tax burdens; *e.g.*, the fact that strictly local businesses pay only one tax (either wholesale or manufacturing), while interstate businesses may possibly be subjected to one tax in this state and another tax at a different level of distribution in another state." 105 Wash.2d at ——.

The Washington Supreme Court, in premising its decision upholding the validity of the Washington tax under the Commerce Clause on *misstated factual differences*,[1] attempts to put aside the Court's decision in *Armco* and obscures the fact that the gross receipts tax system imposed by the State of Washington operates in precisely the same manner as the invalidated West Virginia tax with the same result of impermissible discrimination against interstate commerce.

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[1] The court below emphasized that an essential distinction existed between the Washington and West Virginia gross receipts tax schemes because, unlike Washington which imposes identical rates on each activity, West Virginia imposed a higher tax on wholesaling (0.88%) than on manufacturing activities (0.27%). This distinction was perceived to override the obvious similarities between the two states' taxes and was the basis for the finding that the Washington selling and manufacturing taxes were compensatory. In fact, West Virginia tax exacted the higher tax on its in-state manufacturers (0.88%).

This Court has repeatedly struck down state tax schemes which had the comparable effect of benefitting local interests, emphasizing that a fundamental principle of Commerce Clause jurisprudence mandates that "[n]o State, consistent with the Commerce Clause, may 'impose a tax which discriminates against interstate commerce . . . by providing a direct commercial advantage to local business.'" *See Armco, Inc. v. Hardesty*, 467 U.S. 638 (1984); *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263 (1984); *Westinghouse Electric Corp. v. Tully*, 466 U.S. 388 (1984); *Maryland v. Louisiana*, 451 U.S. 725 (1981); *Boston Stock Exchange v. State Tax Commission*, 429 U.S. 318 (1977); *see also Metropolitan Life Insurance Co. v. Ward*, —— U.S. ——, 105 S. Ct. 1676 (1985) (Alabama's domestic preference tax law which taxed out-of-state insurance companies at a higher rate than domestic insurance companies declared unconstitutional under the Equal Protection Clause where the effect of the discrimination found similar to the type of burden on interstate commerce prohibited by the Commerce Clause). For that reason, Washington's attempt to circumvent the *Armco* holding should be struck down in the cases before this Court.

CONCLUSION

For the foregoing reasons, Washington's gross receipts tax system should be declared in violation of the Commerce Clause of the United States and the decisions below should be reversed.

Respectfully submitted,

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Nos. 85-1963 and 85-2006

Supreme Court, U.S.
FILED
DEC 8 1986
JOSEPH F. SPANIOL, JR.
CLERK

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QUESTIONS PRESENTED

1. Whether Washington's gross receipts tax on manufacturing and wholesaling activities within the State discriminates against interstate commerce, in violation of the Commerce Clause, because a local manufacturer-seller that pays the wholesale tax is protected from double taxation by an exemption from the manufacturing tax.

2. Whether the Commerce Clause precludes the imposition of any gross receipts tax, given that gross receipts, used as a measure of the tax base, may include value derived from activities in other States.

3. Whether either the Commerce Clause or the Due Process Clause precludes Washington from taxing an out-of-state manufacturer that engages in regular, substantial business activity in the State through independent sales representatives rather than employees.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

Nos. 85-1963 and 85-2006

TYLER PIPE INDUSTRIES, INC.,
Appellant,

v.

STATE OF WASHINGTON DEPARTMENT OF REVENUE,
Appellee.

NATIONAL CAN CORPORATION, *et al.*,
Appellants,

v.

STATE OF WASHINGTON DEPARTMENT OF REVENUE,
Appellee.

On Appeal from the Supreme Court of Washington

BRIEF OF THE NATIONAL GOVERNORS' ASSOCIATION, NATIONAL LEAGUE OF CITIES, NATIONAL ASSOCIATION OF COUNTIES, INTERNATIONAL CITY MANAGEMENT ASSOCIATION, NATIONAL CONFERENCE OF STATE LEGISLATURES, AND U.S. CONFERENCE OF MAYORS AS *AMICI CURIAE* IN SUPPORT OF APPELLEE

INTEREST OF THE *AMICI CURIAE*

The *amici*, organizations whose members include state, county, and municipal governments and officials throughout the United States, have a compelling interest in legal issues that affect state and local governments. This case concerns the constitutionality of a business and occupation tax imposed by the State of Washington on busi-

nesses that manufacture or sell goods at wholesale in the State. If this Court accepts the arguments raised against the tax, the State has estimated that the actual and projected potential tax refund liability will exceed $423 million, exclusive of interest. J.A. 205. In addition, because a gross receipts tax is a kind of sales tax,[1] the case has significant potential to affect the ability of state and local governments to impose sales taxes on national businesses. Since 1944, the general retail sales tax has been the most important tax source of state government.[2]

Since this Court's decision in *Armco Inc. v. Hardesty*, 467 U.S. 638 (1984), invalidating a West Virginia tax, Washington has been the only State that imposes a general business and occupation tax. Washington imposes no income tax, choosing instead to raise the revenue necessary to fund essential state functions and other governmental programs from the business and occupation tax, as well as a sales tax. *Amici* are concerned that invalidation of the tax challenged in this case will severely limit the policy choices constitutionally available to state and local governments in formulating tax policy and, in particular, will require Washington to overhaul its entire tax structure. The power to raise revenue by imposing taxes is the essence of sovereignty; and the States, as sovereigns in our constitutional system of government, "possess an independent and uncontrollable authority to raise their own revenues for the supply of their own wants." *The Federalist* No. 32, at 198 (A. Hamilton) (Mentor ed.

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[1] J. Hellerstein & W. Hellerstein, *Cases and Materials on State and Local Taxation* 551 (4th ed. 1978).

[2] Forty-five States and the District of Columbia currently impose sales taxes, which account for 32% of their tax collections. In addition, as of October 1984, local sales taxes were imposed in 26 States. About 6,400 local governments annually collect $12.6 billion, an average of 10.2% of 1984 tax revenues. In some cities, however, sales taxes account for 60% of revenue. J. Aronson & J. Hilley, *Financing State and Local Governments* 94 (4th ed. 1986) (citing Census Bureau data).

1961). In our view, the Constitution requires the widest possible latitude for state and local taxes and the exceedingly sparing application of federal preemption under the Commerce Clause or the Due Process Clause.

As a Nation, we have come to another turning point in the balance of power and responsibilities between the federal government and state and local governments. For years, the federal government has appropriated an increasing share of the national income; but the reciprocity previously provided through revenue sharing has been abandoned, and grants-in-aid have been severely reduced. Adding even further to the financial burden on state and local governments is Congress's increasing reliance on state and local budgets to pay for social service programs and benefits previously funded by the federal government. The struggle of state and local governments for economic solvency and self-sufficiency cannot be successful if the limited tax base available to state and local governments continues to be eroded through federal preemption. Increasingly, national businesses are asserting federal preemption of state and local taxes to avoid paying their fair share for the protection and the benefits that government provides. *E.g., R.J. Reynolds Tobacco Co. v. Durham County, N.C.*, Nos. 85-1021, 1022 (U.S. Dec. 9, 1986); *Wardair Canada, Inc. v. Florida Department of Revenue*, 106 S.Ct. 2369 (1986); *Container Corp. of America v. Franchise Tax Board*, 463 U.S. 159 (1983). Such preemption not only imposes an unfair burden on other taxpayers but undermines the State's ability to govern because, quite simply, government services and benefits cost money. *Amici* therefore urge the Court to reaffirm the standards developed in its recent cases: state taxes are not invalid under the Supremacy Clause unless a finding of conflict with constitutional principles or with federal law is clearly and unavoidably compelled.

Amici submit that the decisions of the Washington Supreme Court are correct. Because this Court's decision will have a direct effect on matters of prime importance

to *amici* and their members, *amici* submit this brief to assist the Court in its resolution of the case.[3]

STATEMENT OF THE CASE

Amici adopt appellee's statement of the case and emphasize the following points. The appellant corporations each conduct at least part of their business within the State of Washington. They challenge the constitutionality of Washington's levy of its business and occupation ("B & O") tax. The B & O tax is assessed for the "act or privilege of engaging in business activities" in the State of Washington and is levied against the value of all products manufactured or sold at wholesale in the State. Wash. Rev. Code § 82.04.220. The tax imposed is a percentage (0.44%) of the gross receipts derived from the sale of the products.

The tax, levied uniformly on all intrastate or interstate businesses that manufacture or wholesale products in Washington, contains a "multiple activities exemption," applicable to a business that both manufactures and sells its product within the State. Wash. Rev. Code § 82.04.440. That business is exempt from the manufacturing tax on the product because it pays the wholesale tax on the same product.

None of the appellants pays a gross receipts tax on manufacturing or wholesaling to any other State. Appellants challenge the B & O tax on the ground that it discriminates against interstate businesses and is not fairly apportioned to the activities performed in Washington.

Appellant Tyler Pipe also challenges the B & O tax on the ground that the company does not have sufficient "nexus" to the State of Washington to be subject to a

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[3] Pursuant to Rule 36 of the Rules of this Court, the parties have consented to the filing of this brief. Their letters of consent have been filed with the Clerk of the Court.

state tax there. Tyler Pipe solicits substantial sales and provides services to its customers in Washington through exclusive sales agents who are independent contractors, rather than employees of the company. Although these agents perform services functionally equivalent to those performed by direct employees of other companies, Tyler Pipe argues that their status as independent contractors creates a shield insulating it from tax liability.

SUMMARY OF ARGUMENT

This Court properly refuses to strike down a state tax as unconstitutional absent a clear and convincing showing that it has an unlawful effect. This restraint recognizes the essential power that States retain under our federal system to raise revenue by taxation so that they may provide the services and other attributes of a civilized society. The Court has invalidated state taxes under the Commerce Clause only when they conferred a direct benefit on local business and when the litigant challenging a tax has demonstrated that it suffers an actual adverse impact.

The recent decision in *Armco Inc. v. Hardesty*, 467 U.S. 638 (1984), on its facts, merely stands for the proposition that a state tax is unconstitutional if it facially discriminates against interstate commerce. Yet appellants, relying on *dicta* in *Armco*, would extend its holding to facially neutral taxes on the basis of hypothetical discrimination. This departure from settled law is particularly disturbing because it ignores not only the traditional principles applicable to state tax challenges, but also the concept that a litigant must establish injury in fact to confer Article III standing. This Court should reject appellants' efforts to expand *Armco*.

When Washington's B & O tax is judged by traditional standards, it is clear, as this Court has held on three previous occasions, that it passes constitutional muster. The tax treats interstate and intrastate businesses equally and allows them to make tax-neutral decisions. In short, it does not discriminate against interstate commerce.

Appellants are no more successful on their fair apportionment claim. Appellants have not shown that the tax is out of all proportion to the business conducted in the State, which is the apportionment standard applicable to state taxation of interstate businesses. Appellants can show at most an incidental burden of multiple taxation, stemming from a partial overlap in the measures of various taxes imposed by other States. Any such overlap, however, results not from any infirmity in Washington's tax, but merely because Washington's tax differs from those of its neighbors. Washington is entitled to apportion its gross receipts taxes by allocation and is not required to use an apportionment formula appropriate to income taxes. Washington's allocation taxes a business exactly in proportion to its activity in the State.

Finally, appellant Tyler Pipe's suggestion that a business can avoid its fair burden of state taxation by relying on independent contractors rather than employees to solicit sales and to service clients must be rejected out of hand. Tyler Pipe's substantial business in Washington enjoys the services and benefits conferred by the State; whether it does so through direct employees or independent contractors has no constitutional significance.

ARGUMENT

I. THE POWER TO TAX IS AT THE CORE OF STATE SOVEREIGNTY, AND THE STATES ARE ENTITLED TO SUBSTANTIAL DISCRETION IN DESIGNING THEIR TAX SYSTEMS.

Appellants broadly challenge the specific tax scheme enacted by the State of Washington. Appellants' challenge is fueled in great part by *dicta* in this Court's recent opinion in *Armco Inc. v. Hardesty*, 467 U.S. 638 (1984). Certain language in *Armco* represents a dramatic departure from prior decisions judging the validity of state tax systems. As we explain more fully in Part II, *Armco* is not controlling here. But we also urge this Court to recognize that the broad *dicta* in *Armco* are not

consistent with the respect that the Court traditionally shows for state tax schemes, reflecting its appreciation of the fundamental relationship between the power to tax and the existence of vital state governments. In brief, the Court has repeatedly recognized that (1) the power to tax to raise revenue is an essential attribute of state sovereignty, (2) the Constitution does not require uniformity among the States as to the type of taxes imposed, and (3) the choice of a particular tax system is by its nature legislative. These principles, more fully discussed below, should inform this Court's analysis, and, when applied to this case, demonstrate the constitutionality of Washington's tax scheme.

A. The Power To Tax Is An Essential Attribute Of State Power.

The power to impose taxes in an inherent attribute of state sovereignty. The States "possess an independent and uncontrollable authority to raise their own revenues for the supply of their own wants." *The Federalist* No. 32, at 198 (A. Hamilton) (Mentor ed. 1961). Taxing authority is essential if States are to provide services and the other features of a "civilized society" to their citizens and to those businesses, both intrastate and interstate, that choose to conduct business within a State's borders. *See Exxon Corp. v. Wisconsin Department of Revenue*, 447 U.S. 207, 228 (1980); *see also Union Pacific Railroad v. Peniston*, 85 U.S. (18 Wall.) 5, 33 (1873) (without the power to tax, "it is manifest the state governments would be paralyzed").

Accordingly, constitutional limitations on a State's power to tax must be construed in light of the very real needs of the State to raise revenue (*id.* at 30-31):

> It cannot be that a State tax which remotely affects the efficient exercise of a Federal power is for that reason alone inhibited by the Constitution. To hold that would be to deny to the States all power to tax persons or property . . . . The States are, and they must ever be, coexistent with the National govern-

> ment. Neither may destroy the other. Hence the Federal Constitution must receive a practical construction. Its limitations and its implied prohibitions must not be extended so far as to destroy the necessary powers of the States, or prevent their efficient exercise.

A "practical construction" of the Constitution confers upon the States substantial discretion in levying taxes; limitations imposed by the Commerce Clause or the Due Process Clause should be sparingly applied only to the most compelling cases of clear constitutional violation. *See Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 622 (1981) ("This Court has indicated that States have considerable latitude in imposing general revenue taxes.").

B. The Choice Of A Tax Scheme Is An Exercise Of Legislative, Not Judicial, Prerogative.

Appellants broadly attack the constitutionality of Washington's B & O tax, a gross receipts tax adopted as a general revenue device. Although a State's power to tax is limited by the Commerce Clause, this Court has steadfastly refused to substitute its judgment for that of the state legislature as to the propriety of any paricular tax system. The Constitution is neutral with respect to a preference for any particular kind of tax. *See Moorman Manufacturing Co. v. Bair*, 437 U.S. 267, 279 (1978). In *Moorman*, this Court was faced with a challenge to an income tax scheme that was unique among the States. The "asserted constitutional flaw" of the challenged tax was that "it is different from that presently employed by a majority of States and that difference creates a risk of duplicative taxation." *Id.* at 278. If that characteristic itself made the tax unconstitutional, only a uniform rule for state income taxes, imposed by the Court, could have overcome the infirmity. This the Court refused to do. "Although the adoption of a uniform code would undeniably advance the policies that underlie the Commerce Clause, it would require a policy decision based on political and economic considerations that vary from State to State." *Id.* at 279. Accordingly, Washington's B & O

tax is not infirm solely to the ground of its uniqueness and the consequent difficulty in making it fit neatly with the varying tax structures of other States.

The Court should be particularly reluctant to strike down Washington's B & O tax because it represents the "longstanding tax policy" of the State. *See Moorman Manufacturing*, 437 U.S. at 280 n.16. Washington has levied a B & O tax since 1953 and has never levied a personal or corporate income tax, the only serious alternative to a gross receipts tax. In fact, the State Supreme Court has held that a corporate income tax is unconstitutional under the uniformity clause of the state constitution. *See Power, Inc. v. Huntley*, 39 Wn.2d 191, 235 P.2d 173 (1951). As an expression of the political will of the people of the State of Washington, the choice of a B & O tax should be respected by this Court.

An adverse decision on the apportionment issue in this case may well preclude any gross receipts taxes, notwithstanding this Court's repeated judgment that the tax is constitutional.[4] Appellants argue that Washington must apportion part of the manufacturing value or wholesale price of a product to activity in other States. But a gross receipts tax is a tax on *gross* receipts, *i.e.*, *all* of a business' receipts within the taxing jurisdiction. Accordingly, a holding that Washington may not constitutionally tax all of the gross receipts of manufacturing or wholesaling activity within the State is essentially a holding that no gross receipts tax may ever be imposed.

An adverse decision on the discrimination issue may also force Washington to abandon its gross receipts tax system. The discrimination challenge is based on the multiple activities exemption, which protects local manufacturer-sellers from double taxation by exempting them

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[4] *General Motors Corp. v. Washington*, 377 U.S. 436 (1964); *Standard Pressed Steel Co. v. Washington Department of Revenue*, 419 U.S. 560 (1975); *Chicago Bridge & Iron Co. v. Washington Dep't of Revenue*, 98 Wn.2d 814, 659 P.2d 463, *appeal dismissed*, 464 U.S. 1013 (1983).

from paying the manufacturing tax on the same goods on which they have paid the wholesale tax.[5] As we discuss more fully below (pp. 16-17), the multiple activities exemption serves two essential purposes: to prevent discrimination *against* local business, and fairly to "encourage the growth and development of intrastate commerce and industry" (*see Boston Stock Exchange v. State Tax Comm'n*, 429 U.S. 318, 336 (1977)). A decision that Washington must impose a double gross receipts tax on its local manufacturer-wholesalers would leave the State with only two choices: either adopt taxing policies that are plainly harmful to the economic future of the State, or abandon its strongly held political consensus against income taxation. This is a choice that Washington should not have to make.

II. WASHINGTON'S GROSS RECEIPTS TAXES ON MANUFACTURING AND WHOLESALING DO NOT DISCRIMINATE AGAINST INTERSTATE COMMERCE.

The constitutional test for the validity of a state tax is found in *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 279 (1977), which held that a tax is valid under the Commerce Clause if it "is applied to an activity with a substantial nexus with the taxing State, is fairly apportioned, does not discriminate against interstate commerce,

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[5] In an attempt to protect the source of the essential revenue collected through the B & O tax, the Washington state legislature, after this Court's decision in *Armco*, enacted a contingent tax credit available to companies that manufacture out of the State, to go into effect if there were a judicial decision that the multiple activities exemption discriminated against interstate commerce. The credit would be available to out-of-state manufacturers against Washington's wholesaling tax for amounts paid as gross receipts taxes on manufacturing in other States. Wash. Rev. Code § 82.04.440(4). Appellants' claims of discrimination, however, are not limited to the failure of the current tax scheme to provide the credit contained in this fallback provision. Should the Court accept any of these broader arguments, the fallback provision might not be sufficient to sustain the multiple activities exemption, which is integral to Washington's gross receipts tax system.

and is fairly related to the services provided by the State." Appellants National Can, *et al.*, rest their argument primarily on the contention that Washington's gross receipts taxes on manufacturing and wholesaling discriminate against interstate commerce. Appellants also challenge the fair apportionment prong of the test. Appellant Tyler Pipe challenges the nexus, fair apportionment, and discrimination prongs of the test.

A. *Armco* Is Not Controlling In This Case.

All the appellants rest their discrimination claims primarily upon the Court's opinion in *Armco*. But *Armco* is not controlling here. *Armco* stands only for the proposition that a state tax that facially discriminates against interstate commerce in invalid. The issue in *Armco*, as the Court noted, was whether "West Virginia's *wholesale* gross receipts tax, *from which local manufacturers are exempt*, unconstitutionally discriminates against interstate commerce." 467 U.S. at 639 (emphasis supplied). The Court found that it did. *Id.* at 642. West Virginia sought to overcome this facial discrimination by arguing that the wholesale tax was a constitutionally acceptable equivalent for the State's manufacturing tax, which was not assessed against out-of-state businesses. *Ibid.* The Court rejected this argument because of differences in the rates and the bases of the two taxes. *Id.* at 643.

Having rejected West Virginia's only defense to the facial discrimination of the wholesaling tax, the Court need not have gone any further; and had the opinion stopped there, the discrimination challenge in this case might well not be before the Court. This Court has repeatedly upheld the Washington gross receipts tax, and none of the discussion of facial discrimination aids appellants, who in fact do not rely on the holding of *Armco*. Appellants' challenge arises only because the *Armco* opinion contains certain generalized assumptions and broad conclusions regarding the validity of state tax schemes. These statements, which were not necessary to dispose of the case, are properly regarded as *dicta* and

therefore not controlling precedent. *See R.J. Reynolds Tobacco Co. v. Durham County, N.C.*, Nos. 85-1021, 1022 (U.S. Dec. 9, 1986); *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 399 (1821). They should, in particular, be treated as noncontrolling *dicta* because they represent such serious departures from the Court's prior cases. In at least three respects, the *Armco* opinion breaks with the Court's long-standing approach to discrimination claims.

First, the Court did not evaluate the combined effect of the West Virginia manufacturing and wholesale taxes, and thus did not consider the actual effect of the State's tax system on Armco. In fact, as a practical matter, the tax scheme imposed a substantially higher tax rate on an in-state manufacturer than on an out-of-state wholesaler. But the Court explicitly stated that it would not require Armco to prove "actual discriminatory impact on it." 467 U.S. at 644. This approach departs from the established test that unconstitutional discrimination means actual discrimination against interstate commerce in the form of a direct commercial advantage to local business. *See Boston Stock Exchange*, 429 U.S. at 329.

Second, and more important, for the first time ever, the Court judged the West Virginia tax system solely on the basis of hypothetical discrimination arising from the interplay of that system with taxes that *could be* (but in fact were not) imposed by *other States*. The Court never found, and could not find on the record before it, that the West Virginia tax system had an actual discriminatory impact on interstate commerce. As Justice (now Chief Justice) Rehnquist noted in dissent, the impact of West Virginia's system as a whole fell more heavily on intrastate than on interstate commerce. 467 U.S. at 647. The discriminatory impact was found only by reference to hypothetical taxes that other States might impose. Prior cases, however, demand that state taxes challenged under the Commerce Clause be judged by their "practical operation" (*Best & Co. v. Maxwell*, 311 U.S. 454, 456 (1940))

or "actuality of operation" (*Halliburton Oil Well Cementing Co. v. Reily*, 373 U.S. 64, 69 (1963)).[6]

Third, the Court employed, also for the first time, the principle of "internal consistency" as a test for unconstitutional discrimination. Although the Court had previously announced the internal consistency standard as a measure of the fair apportionment of a state income tax (*see Container Corp. of America v. Franchise Tax Board*, 463 U.S. 159 (1983)), no case had suggested that the internal consistency principle was relevant in determining whether a state tax was discriminatory.

There are strong reasons why the *Armco dicta* should not be deemed controlling in this or any other case. Foremost is that the application of a "hypothetical discrimination" test is completely at odds with the constitutional prerequisites for standing imposed by the "cases and controversies" requirement of Article III, § 2 of the Constitution. *See, e.g., Valley Forge Christian College v. Americans United*, 454 U.S. 464, 471-72 (1982). One of the fundamental requirements for standing is a showing of "some actual or threatened injury" to the plaintiff. *Ibid.* "Abstract injury is not enough" (*City of Los Angeles v. Lyons*, 461 U.S. 95, 101 (1983)), and standing is not conferred as a result of a "conjectural" or "hypothetical" injury. *Id.* at 102.

The actual injury requirement should defeat jurisdiction of a claim based solely upon the taxpayer's ability to

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[6] In *Gwin, White & Prince, Inc. v. Henneford*, 305 U.S. 434 (1939), the Court invalidated a Washington gross receipts tax that was not fairly apportioned to activities within the State. *See id.* at 439. The Court did not require a showing of actual discrimination through multiple taxation, but found that the absence of fair apportionment was itself sufficient to invalidate the tax. The Court did not hold that a fairly apportioned tax could be struck down without any showing of actual discrimination against interstate commerce. The current Washington gross receipts taxing system is fairly apportioned, as we show below (pp. 21-25); and, therefore, nothing in *Gwin, White* suggests that it is invalid.

imagine a tax in another State which, in combination with the challenged tax, might result in discrimination against an interstate business. The Court has consistently applied rigorous standing requirements to taxpayer suits. *See Valley Forge; Flast v. Cohen*, 392 U.S. 83 (1968). To be sure, appellants have an economic, rather than political or social, stake in the outcome of this case: they would like to avoid some or all of their tax obligations to the State of Washington. Nevertheless, a claim of a hypothetical tax burden is simply not a case or controversy involving the "actual or threatened injury" required under Article III.

If appellants' claims are addressed, this Court's recent opinion in *R.J. Reynolds Tobacco Co. v. Durham County, N.C.*, Nos. 85-1021, 1022 (U.S. Dec. 9, 1986), indicates the appropriate course. *Reynolds* disposed of a similar challenge to a state tax based on *dictum* in a previous opinion, *Xerox Corp. v. Harris County, Texas*, 459 U.S. 145 (1982), which had suggested that any state property tax imposed on imported goods stored in customs bonded warehouses was invalid. In *Reynolds*, the Court unanimously upheld a state tax imposed on goods imported and stored for domestic use, easily limiting *Xerox* to its facts and its narrow holding, which concerned only goods stored for re-export. We urge the Court in this case similarly to separate the facts and the holding of *Armco* from its *dicta*. The West Virginia wholesaling tax under review in that case was found to discriminate on its face against interstate business. The Washington tax at issue here does not. When the *dicta* in *Armco* are stripped away, as *Reynolds* teaches, Washington's tax clearly passes constitutional muster. This Court has so held on three prior occasions. See note 4, *supra*.

B. Washington's Wholesaling Tax Does Not Discriminate Against Interstate Commerce.

The actual holding in *Armco* provides no support for appellants' challenge to the wholesaling tax because *Armco* held only that a facially discriminatory tax vio-

lated the Commerce Clause. The Washington wholesaling tax is not discriminatory on its face or in its operation. Every wholesaler in the State pays a wholesaling gross receipts tax of 0.44%. The tax applies equally to wholesalers who manufacture within the State and wholesalers who manufacture outside the State. Every wholesaler is treated the same as every other wholesaler.

Appellants' argument that the Washington wholesaling tax nevertheless violates the Commerce Clause relies on *Maryland v. Louisiana*, 451 U.S. 725 (1981). National Can Br. 7-8; Tyler Pipe Br. 16-17. In *Maryland*, a number of States and pipeline companies challenged Louisiana's first-use tax as applied to natural gas brought into Louisiana from the Outer Continental Shelf ("OCS"). *Id.* at 728. Louisiana imposed an equivalent severance tax on natural gas produced within the State. *Id.* at 731. Three aspects of the first-use tax favored local interests and discriminated against interstate commerce. First, there was an exemption from the tax for OCS gas used for certain purposes within Louisiana but not outside Louisiana. Second, a full credit against the first-use tax was given to producers of gas in Louisiana but not to producers in other States. Third, other tax credits had the effect of shielding Louisiana consumers, but not consumers in other States, from the impact of the tax. On these bases, the Court held that Louisiana's first-use tax was protectionist legislation; it was found to impose as much tax as possible on producers and consumers outside the State and as little tax as possible on producers and consumers within the State. *Id.* at 757, 758.

The only element of the Louisiana first-use tax scheme that bears any resemblance to the Washington wholesaling tax is the credit that was given to producers of OCS gas who also produced gas subject to the Louisiana severance tax. Appellants argue that this credit is similar in effect to Washington's multiple activities exemption, available to local manufacturers if they pay the wholesaling tax. But that exemption differs radically from Loui-

siana's first-use tax credit, which was granted for local economic activity *unrelated* to production of OCS gas. Thus, an OCS gas producer with unrelated production in Louisiana gained a "direct commercial advantage" over an otherwise identical OCS gas producer having no other production in Louisiana. The tax scheme therefore could be said to discriminate against out-of-state companies.

Washington's multiple activities exemption grants no "direct commercial advantage" to a local manufacturer. It does not reward a business for engaging in other economic activity in Washington. All goods are subject to the same rate of tax; both interstate and intrastate businesses are treated neutrally. In fact, the effect of the Washington multiple activities exemption is precisely the opposite of Louisiana's first-use tax credit. The exemption *equalizes* tax burdens placed on goods manufactured in Washington and goods manufactured elsewhere, by ensuring that an item manufactured and sold in Washington will not be subject to a *greater* tax burden than the same item sold in Washington but manufactured elsewhere.

The multiple activities exemption serves two essential purposes. First, the exemption prevents discrimination *against* local business. Without the exemption, local manufacturers that sell their products in the State would pay two gross receipts taxes (one for manufacturing and one for wholesaling), while out-of-state manufacturers selling in the state would pay one gross receipts tax (for wholesaling). In the real world, and contrary to the purely hypothetical situations postulated by appellants, no other State imposes a gross receipts tax on manufacturing. Thus, without the multiple activities exemption, local manufacturers would be disadvantaged in competing with out-of-state manufacturers for sales within the State.

The second essential purpose of the multiple activities exemption, consistently recognized as legitimate for a state tax system, is fairly to "encourage the growth and development of intrastate commerce and industry." *Bos-*

ton Stock Exchange, 429 U.S. at 336. In *Boston Stock Exchange*, the Court expressly recognized the validity of "two activities for the price of one" encouragement. While striking down a facially discriminatory amendment to a state tax, the Court approved the State's previous law (*id.* at 330); that law imposed a tax if any one of five taxable events occurred within the State, but if more than one taxable event occurred in the State, only one tax was payable (*id.* at 322). Washington's gross receipts tax does just the same.

For these reasons, the Washington wholesaling tax does not discriminate against interstate commerce. The statute on its face applies to all wholesaling within the State, and the exemption from the manufacturing tax granted to in-state manufacturers merely ensures that no goods will be taxed twice. The tax is a model of a neutral tax that affects all businesses equally. Neither *Maryland v. Louisiana* nor any other decision of this Court supports the invalidation of such a tax under the Commerce Clause.

C. The Application Of The Washington Manufacturing Tax Solely To Local Manufacturers Selling Outside The State Does Not Discriminate Against Out-Of-State Manufacturers Selling Within The State.

In challenging the Washington wholesale gross receipts tax as discriminatory, appellants seem to recognize that this tax applies to all sellers without exception. Yet Xerox and others argue that the application of the manufacturing tax to local manufacturers only when they sell outside the State somehow makes discriminatory the tax imposed on the selling activity of out-of-state manufacturers. Stated another way, they argue that because local manufacturers who sell their products in the State are exempt from the manufacturing tax, the selling tax is discriminatory as applied to out-of-state manufacturers. This argument is without merit for several reasons. Whether viewed by itself or as part of the entire gross receipts tax

scheme, the manufacturing tax is discriminatory neither on its face nor in its effect on out-of-state manufacturers.

First, the manufacturing tax applies identically to in-state and out-of-state manufacturers selling goods in Washington. Neither group pays any manufacturing tax. In-state manufacturers are exempt from the manufacturing tax under the multiple activities exemption, and out-of-state manufacturers are not subject to the tax. In addition, because in-state and out-of-state manufacturers are subject to the same rate of wholesaling tax in Washington, their overall state tax burden is the same.

The record is barren of any evidence that any other State imposes a gross receipts tax on manufacturing. Thus, none of the out-of-state manufacturers selling in the State can be said to pay any higher taxes than a local manufacturer-seller. Because the "actuality of operation" of the Washington tax system does not discriminate against any of the appellants, none of them has standing to challenge the tax.[7]

In any event, Washington's wholesaling gross receipts tax would not be invalid even if another State imposed a manufacturing gross receipts tax, and a manufacturer in that State selling in Washington were thus subject to a greater total tax burden than a Washington manufacturer. Whether Washington provides an exemption for in-state manufacturers should be of no concern to an out-of-state manufacturer because it is not subject to the manufacturing tax either. As applied to out-of-state manufacturers, Washington's system is the same as one that taxes only wholesaling.

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[7] To the extent that *dicta* in *Armco* would excuse a showing of "actual discrimination," it should either be read in the light of the fact confronting the Court in that case, *i.e.*, a statute that was facially discriminatory, or disregarded in favor of the decades of precedent examining the actual operation of challenged state taxes. See discussion *supra*, at pp. 11-14.

In *Armco*, the Court described precisely this type of tax as permissible under the Commerce Clause. The Court stated (467 U.S. at 645):

> It is true, as the State of Washington appearing as *amicus curiae* points out, that Armco would be faced with the same situation that it complains of here if Ohio (or some other state) imposed a tax only upon manufacturing, while West Virginia imposed a tax only upon wholesaling. In that situation, Armco would bear two taxes, while West Virginia sellers would bear only one. But such a result would not arise from impermissible discrimination against interstate commerce, but from fair encouragement of in-state business.

Thus, the claim that the exemption of Washington wholesalers from the *manufacturing* tax makes discriminatory the application of the *wholesaling* tax to out-of-state manufacturers lacks merit, even if they are subject to a manufacturing tax in another state.

D. The Washington Manufacturing Tax Does Not Discriminate Against Local Manufacturers Selling Out Of The State.

A number of appellants represented by Kalama manufacture in Washington products that they sell outside the State. This group claims that Washington's manufacturing tax discriminates against them because they have to pay the tax while local manufacturers who sell their products in-state are exempt.

This argument finds no support in *Armco*, because, in *Armco*, all West Virginia manufacturers paid the same tax regardless of where they sold their products. *Maryland v. Louisiana* also offers no comfort to these appellants because it did not involve a challenge to a manufacturing tax on any products originating in Louisiana. The tax was imposed on a product brought *into* Louisiana from the Outer Continental Shelf, and its effect was to allow a product to be sold in Louisiana at a lower price

than the same product could be sold in other States. *Maryland*, 451 U.S. at 756. The Washington statute works no such discrimination. To the contrary, it is designed merely to equalize the impact of the gross receipts tax on all manufactured goods. Goods manufactured in Washington and shipped elsewhere bear a tax burden of 0.44% when they leave the State; if they are sold to a consumer in the State, they bear the same 0.44% tax when they leave the stream of commerce in Washington. Although the exporter pays the manufacturing tax, and the local seller pays the wholesaling tax, the *dollar* tax burden on each is identical. Thus, the Washington tax system does not enable a consumer in Washington to purchase manufactured goods at a lower price than a consumer of the same goods in another State.

The exemption of local wholesalers from the manufacturing tax is necessary to avoid unfair treatment of local business. If Washington imposed gross receipts taxes on both the local manufacture and the local sale of products, its consumers would have a clear economic incentive to travel to neighboring States to purchase goods. Similar economic consequences, resulting from the imposition of a retail sales tax on goods sold in the State without a compensating use tax on goods brought into the State, have led the States to impose compensating use taxes, long upheld by this Court. *See Henneford v. Silas Mason Co.*, 300 U.S. 577 (1937). Washington's multiple activities exemption is the obverse of the same coin; like a compensating use tax, it treats out-of-state and domestic goods equally in order to avoid incentives to residents to make purchases in other States.[8]

The Washington gross receipts taxing system must be viewed in its entirety, just as this Court viewed the

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[8] Such "[e]qual treatment of interstate commerce . . . has been the common theme running through the cases in which this Court has sustained 'compensating,' state use taxes." *Boston Stock Exchange*, 429 U.S. at 331.

Washington sales and use tax system in *Henneford*. So viewed, it represents the State's attempt to achieve equality in the treatment of all goods manufactured or sold at wholesale in Washington. The multiple activities exemption is a necessary element of that equality. Without that exemption, local business would suffer an actual discrimination measurable in dollars and cents. With the exemption, interstate commerce suffers neither actual nor meaningful hypothetical discrimination.

Finally, appellants contend that the Washington taxing scheme is flawed because it provides an incentive for businesses to move into the State of Washington to avoid paying both the hypothetical manufacturing tax in the other State and the actual wholesaling tax in Washington. Even if such an incentive existed, however, it would provide no basis for invalidating a state tax under the Commerce Clause. In *Boston Stock Exchange* (429 U.S. at 336-37) and again in *Armco* (467 U.S. at 642), this Court made it clear that so long as a State does not engage in "impermissible discrimination against interstate commerce," it is free to use its taxing system to encourage the growth or relocation of business within the State. Because Washington's taxing system does not so discriminate, any incentive that it may provide for businesses to relocate to Washington is of no constitutional significance.

III. WASHINGTON'S TAX IS APPORTIONED EXACTLY TO THE ACTIVITIES TAXED.

A. The B & O Tax Does Not Result In Multiple Taxation.

Appellants assert that the Washington tax is invalid because it is not fairly apportioned. This argument rests solely on claims of multiple taxation. *See* Brief of *Amici* Amcord, *et al.* ("Amcord"), adopted in National Can Br. 17. But it is clear that, in the context of interstate commerce, the risk of multiple taxation cannot, in and of itself, be the basis for invalidating a state tax. Moreover, Amcord ignores the distinction between a gross receipts tax (such as the B & O) and an income-based tax. As a

consequence, Amcord misstates the tax burden that may constitutionally be imposed on interstate commerce and urges the application of an improper apportionment test.

In *Container Corp. of America v. Franchise Tax Board*, 463 U.S. 159 (1983), the Court held that the test for the validity of state taxes imposed on interstate businesses, like appellants, is not whether a tax may result in multiple taxation, but whether the "taxpayer can prove 'by clear and cogent evidence' " that the tax "is in fact 'out of all appropriate proportions to the business transacted . . . in that state.' " *Id.* at 169-70 (quoting *Moorman Manufacturing Co.*, 437 U.S. at 274, and *Hans Rees' Sons, Inc. v. North Carolina*, 283 U.S. 123, 135 (1931)).[9] Accordingly, appellants' and Amcord's claims of multiple taxation must fail because, quite simply, they have not established by clear and convincing evidence a tax wholly out of proportion to their activities in Washington.

Rather than meet this test, appellants and Amcord offer a simplistic and superficial argument. They contend that because Washington's tax is assessed against 100% of the gross receipts from the sale of goods, it is a tax on their full value, and therefore constitutes multiple taxation if any other State imposes a tax based on the value of the same goods.[10] Thus, National Can contends that it is exposed to multiple taxation because it is subject to a California income tax that uses a base including the

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[9] *Japan Line, Ltd. v. County of Los Angeles*, 441 U.S. 434, 451 (1979), which concerned a state tax on foreign commerce, is irrelevant here.

[10] Appellants' argument proves far too much. Their focus on whether the full value of the goods is subject to tax in Washington would seem to render vulnerable even a retail sales tax on any product subject to a gross receipts tax or included in the gross receipts used as the measure of an income tax. The State of destination may constitutionally impose a sales tax (*see, e.g., State Tax Comm'n v. Pacific States Cast Iron Pipe Co.*, 372 U.S. 605 (1963)); and the Court has never suggested that its validity depends on whether it results in the cumulative taxation of more than 100% of the value of the goods.

gross receipts of all sales, including those in Washington. Similarly, Kalama contends that it is subject to multiple taxation because it is subject to an income tax in Illinois based on the proceeds of the sale in that State of goods that it manufactures in Washington.

Washington's gross receipts tax is so different from other States' income taxes that unlawful multiple taxation cannot result. The B & O tax does not use the same measurement of value as an income tax—one taxes the value of doing business in a State, the other the value of the income produced. The two systems are no more comparable than apples and oranges. This Court has often recognized the varying effects and incidents of different kinds of taxes that tax different values, and has upheld the application of state taxes against the claim that they posed a risk of multiple taxation in violation of the Commerce Clause.

In *Exxon Corp. v. Wisconsin Department of Revenue*, 447 U.S. 207, 228 n.12 (1980), the Court distinguished a severance tax from an income tax, and upheld the application of the state apportionment formula to net income from oil and gas production even though producing States might impose a severance tax on the gross value of the mineral extracted or the quantity of production. The B & O tax at issue here is very similar to a severance tax, which has in fact been likened to an occupation tax (*ibid.*); both measure the tax against gross value rather than net income. *Ibid.* Thus, the B & O tax can be imposed without regard to any state income taxes to which appellants may be subject.

Similarly, in *Mobil Oil Corp. v. Commissioner of Taxes*, 445 U.S. 425 (1980), the Court distinguished an *ad valorem* property tax from an income tax, noting that "[t]axation by apportionment and taxation by allocation to a single situs are theoretically incommensurate . . . ." *Id.* at 444. Thus, the Court upheld the application of Vermont's income tax to an apportioned share of dividend income even on the assumption that New York, as the

State of commercial domicile, could impose an unapportioned tax on those dividends. The Court noted simply that Vermont's tax was constitutional because the State sought to tax income, not ownership. *Id.* at 444-46.

These cases make clear that different types of state taxation do not present even the risk of multiple taxation. In some cases, the Court has gone further, upholding state taxes even if they produced actual multiple taxation. In *Moorman Manufacturing Co.*, the Court rejected the claim that "the Commerce Clause prohibits any overlap in the computation of taxable income by the States." 437 U.S. at 278. Thus, Iowa's tax was upheld in spite of the Court's recognition that the State's apportionment of its tax base resulted in multiple taxation. *See also Container Corp., supra* (upholding the tax at issue even though it resulted in actual double taxation).[11]

As noted above, there is no showing in this case of any actual multiple taxation. Thus, the Court need go no further than to recognize, as it has done repeatedly, that the imposition of different types of state taxes creates not even a risk of multiple taxation. Unless the Court is now prepared to prefer as a matter of constitutional law one system over another, it should not invalidate a state tax system merely because it may present the risk of multiple taxation by being "different from the . . . practice of [a] neighbor." *Moorman Manufacturing*, 437 U.S. at 280 n.16.

B. Washington Is Entitled To Apportion By Allocation.

Appellants' and Amcord's apportionment challenge rests on application of the income tax apportionment test. Because of the differences, noted above, between a gross receipts tax and an income tax, the imposition of a formula appropriate to an income tax would invalidate

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[11] If multiple taxation resulting from different tax schemes presents a significant obstacle to interstate commerce, the conflict is appropriate for resolution by congressional legislation or through interstate compacts. *See Commonwealth Edison*, 453 U.S. at 628.

any gross receipts tax. Washington's tax should be upheld if it is "apportioned to its activities within the state." *Gwin, White & Prince, Inc. v. Henneford*, 305 U.S. 434, 439 (1939) (quoted in *Standard Pressed Steel Co. v. Washington Department of Revenue*, 419 U.S. 560, 564 (1975)). As this Court concluded in *Standard Pressed Steel*, the Washington tax meets this test.

A gross receipts tax by definition taxes the value of 100% of the receipts of the taxed activity (*e.g.*, manufacturing or wholesaling) and should not be held invalid merely because it does so. It is invalid only if levied against activities that occur outside of the State. In other words, the gross receipts tax must be "fairly related to the services rendered by [the State], which include police and fire protection, the benefit of a trained work force, and the 'advantages of a civilized society.'" *Exxon Corp.*, 447 U.S. at 228.

The challenged tax here is levied solely at activities occurring within the State of Washington and "is 'apportioned exactly to the activities taxed,' all of which are intrastate." *Standard Pressed Steel*, 419 U.S. at 564. Washington taxes manufacturing within the State and sales at wholesale within the State. Amcord's argument (Br. 9) that goods sold at wholesale in Washington may have received "value" in another State is irrelevant because Washington's wholesaling tax is not a tax on "value added" but a tax on the privilege of engaging in business within the State.[12] This Court has firmly rejected the notion that the Commerce Clause prohibits a tax on the aspects of interstate commerce occurring within a State. *See Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977). That is all that the Washington B & O tax reaches.

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[12] Because a gross receipts tax is a type of sales tax (J. Hellerstein & W. Hellerstein, *op. cit.* 551), formula apportionment is no more appropriate for a gross receipts tax than for a retail sales tax. *See Standard Pressed Steel*, 419 U.S. at 564.

IV. TYLER PIPE HAS A SUFFICIENT NEXUS TO WASHINGTON TO JUSTIFY APPLICATION OF WASHINGTON'S TAXES TO IT.

Appellant Tyler Pipe raises an argument not pursued by the other appellants—that there is an insufficient "nexus" between Tyler Pipe and the State of Washington to justify the imposition of the gross receipts tax on its sales within the State. (See Br. 10-13). The existence of a "substantial nexus" with the taxing State is part of the Commerce Clause test set out in *Complete Auto Transit*, 430 U.S. at 279. Tyler Pipe also contends that there is not a "minimal connection" between its activities and the State of Washington sufficient to support the Washington tax against the limitations imposed by the Due Process Clause. As Tyler Pipe recognizes (Br. 11), the two tests are similar. *See, e.g., Exxon Corp.*, 447 U.S. at 228 (equating the due process nexus requirement with the Commerce Clause test). Both arguments rest primarily on the fact that Tyler Pipe maintains no office in Washington and fills orders directly from its Texas headquarters.

Tyler Pipe's sales in Washington are solicited by independent sales representatives rather than through its own employees. These representatives "handle all sales functions pertaining to [Tyler Pipe's] products in [the] state" and receive a commission on all sales made in their territory even if the customer contacts Tyler Pipe directly. J.S. App. in 85-1963, B-9. The representatives "maintain and improve [its] name recognition, market share, goodwill, and individual customer relations" and transmit to Tyler Pipe "[v]irtually all [the] information" concerning the Washington market that is "necessary to keeping [it] competitive in the marketplace." *Id.* at B-9 to B-10.

There is no question that, if the activities of Tyler Pipe's sales representatives were performed instead by employees, the "substantial nexus" and "minimal connection" tests under the Commerce Clause and the Due Process Clause, respectively, would be easily satisfied. That much is settled by this Court's decision in *Standard*

Pressed Steel, which upheld the imposition of the very tax at issue here upon an out-of-state manufacturer because of the presence in the State of a single employee who serviced a single customer. That employee performed services quite similar to, although not even as extensive as, those performed for Tyler Pipe by its independent sales representatives. In *Standard Pressed Steel*, the employee operated out of his home, consulting with the customer concerning its needs, and following up on sales after delivery of the product. Orders were sent directly to, and filled by, Standard Pressed Steel from its out-of-state home office, to which all payments were also sent.

This Court found a sufficient "nexus" for Commerce Clause purposes between the employee's local activities in Washington and Standard Pressed Steel's interstate sales. The opinion distinguished *Norton Co. v. Department of Revenue*, 340 U.S. 534 (1951), on which Tyler Pipe places heavy reliance, because in that case, the State had not established a sufficient factual nexus between Norton's Chicago office and some of the sales made directly from its Worcester, Massachusetts, headquarters. The Court found that Standard Pressed Steel's situation more closely resembled that in *General Motors Corp. v. Washington*, 377 U.S. 436 (1964), where the activities of non-selling district managers and service representatives were held sufficiently substantial "with relation to the establishment and maintenance of sales, upon which the tax was measured." *Id.* at 447, quoted in 419 U.S. at 563.

The Court decisively rejected Standard Pressed Steel's due process challenge to the tax as "verg[ing] on the frivolous." 419 U.S. at 562. The Court explained that the employee "made possible the realization and continuance of valuable contractual relations between the taxpayer and its customer." *Ibid.* In effect, the Court applied a "but for" test, upholding the tax because the Company would not have been able to make the sales on which it was being taxed but for the activities of the employee.

Similarly, in the present case, the local activities of the independent sales representatives provide a sufficient nexus to satisfy the Commerce Clause and sufficient minimal contacts to satisfy the Due Process Clause. Those sales representatives engage in substantial activity "with relation to the establishment and maintenance of sales, upon which the tax [is] measured" (*General Motors Corp.*, 377 U.S. at 447) and "[make] possible the realization and continuance of valuable contractual relations" (*Standard Pressed Steel*, 419 U.S. at 562) between Tyler Pipe and its customers in the State of Washington.

Tyler Pipe nevertheless argues that it cannot be taxed because it is represented in Washington by independent sales representatives who are not its employees. The very same formalistic argument was unsuccessfully urged in *Scripto, Inc. v. Carson*, 362 U.S. 207 (1960), where the Court held that the Due Process Clause does not differentiate between independent sales representatives and direct employees with regard to state tax liability. In *Scripto*, the Court upheld a Florida statute requiring a Georgia company, with no full-time employees in Florida, to collect and pay use taxes for goods sold in Florida through independent sales representatives. The Court explained (*id.* at 211-12):

> True, the "salesmen" are not regular employees of appellant devoting full time to its service, but we conclude that such a fine distinction is without constitutional significance. The formal shift in the contractual tagging of the salesman as "independent" neither results in changing his local function of solicitation nor bears upon its effectiveness in securing a substantial flow of goods into Florida . . . . Moreover, we cannot see, from a constitutional standpoint "that it was important that the agent worked for several principals." . . . The test is simply the nature and extent of the activities of the appellant in Florida.

As the *Scripto* decision exemplifies, this Court has examined constitutional challenges to state taxes in terms

of real situations rather than legal forms. Tyler Pipe, for reasons of its own convenience, has opted to handle its Washington sales by contractual relations with independent agents rather than through its own employees. Its Washington sales should not be exempt from state tax simply because of the form of business association through which it chooses to conduct its business.

The Court has firmly rejected any such formalistic dependence on physical presence in the State in another context, the due process requirements for a state court's exercise of jurisdiction over a nonresident defendant. There is no question that Washington state courts may assert jurisdiction over Tyler Pipe on the basis of its substantial activities there. The exercise of judicial jurisdiction satisfies due process concerns when the defendant's contacts with the forum state "proximately result from actions by the defendant *himself* that create a 'substantial connection' with [that] state." *Burger King Corp. v. Rudzewicz*, 105 S. Ct. 2174, 2184 (1985), *citing McGee v. International Life Ins. Co.*, 355 U.S. 220, 223 (1957). A defendant that "purposefully avails itself of the privilege of conducting activities within the forum state" (*Hanson v. Denckla*, 357 U.S. 235, 253 (1958)), may not avoid the jurisdiction of its courts "merely because the defendant did not *physically* enter the forum state." *Burger King*, 105 S.Ct. at 2184. Such a rule is fair because of the "inescapable fact of modern commercial life that a substantial amount of business is transacted solely by mail and wire communications across state lines, thus obviating the need for physical presence within a State in which business is conducted." *Ibid.* For the same reasons, Tyler Pipe should be required to bear its fair share of Washington's taxes. "The activities which establish [the company's] 'presence' subject it alike to taxation by the state and to suit to recover the tax." *International Shoe Co. v. Washington*, 326 U.S. 310, 321 (1945); *see also Shaffer v. Carter*, 252 U.S. 37, 49 (1920).

To permit the label that a business may place on its relationships with the agents who create its profits to obscure the benefits that these agents and the business itself receive from the State would place a premium on the creativity of the business community to devise corporate arrangements that will insulate it from paying its fair share of state taxes. This Court's encouragement of such creativity would serve no legitimate purpose, but would severely jeopardize the States' ability to raise sufficient revenue in a fair and equitable manner. Tyler Pipe's challenges to the Washington tax should therefore be rejected.

CONCLUSION

The judgments of the Washington Supreme Court should be affirmed.

Respectfully submitted,

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December 24, 1986